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## Llewellyn Slept Here: A Short History of Sticky Contracts and Feudalism<sup>1</sup>

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<sup>1</sup> With due respect to both George Washington and Dave Barry. *See* DAVE BARRY SLEPT HERE: A SHORT OF HISTORY OF THE UNITED STATES (1989).

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## INTRODUCTION

The balancing in contract law that allows for economic efficiency while providing minimum policing of abuses has become lopsided in recent years. When adhesive contracts were granted legitimacy, courts assumed that certain boundaries would keep their dangers in check; unfortunately, those boundaries have since eroded. Contract law emerged when parties dickered over individual terms. Technology, beginning with moveable type and then rapid presses, introduced changes in practice and gradual dilutions of theory.

The experience and the consequences of adhesive contracting have changed over time, but never more dramatically than since the digital revolution.<sup>2</sup> As businesses have moved into the online marketplace, the temptation to bind customers to lengthier agreements than would have been practicable in the real world has become all too compelling.<sup>3</sup> The advent of the online marketplace has brought with it Terms of Service, Terms of Use, End User License Agreements, Terms and Conditions, Return and Privacy Policies, and so forth (hereinafter “online contracts”).

Significant legal thinkers, especially Karl Llewellyn, conceded the usefulness of adhesion contracts but demanded they be kept within limits. These boundaries, including unconscionability, good faith, and unarticulated judicial discretion, have largely fallen victim to the law and economics movement. Judges rarely use them as tools to effect justice, fearing that it will earn them the label “activist.” The balance has been lost as consumer protection principles have decayed and the use of adhesion contracts has exploded.

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<sup>2</sup> Contracting has not changed, however, for Eli’s grandpa, who is convinced that he will be abducted by the government within twenty-four hours of allowing a computer into his home.

<sup>3</sup> For further discussion of how online contracts vary from real world contracts, see *infra* Part I.

In 1919 an American law review author was the first to use the phrase “contracts of ‘adhesion.’”<sup>4</sup> Little did he realize his legacy when he suggested that “[t]his expressive term seems worthy of a place in our legal vocabulary.”<sup>5</sup> A particularly insightful article later traced the phrase:

“*contrat d’adhésion*” . . . to describe those so-called contracts “in which one predominant unilateral will dictates its law to an undetermined multitude . . . which, as the Romans said, resemble[s] a law much more than a meeting of the minds.” In France, the need for the distinct treatment of such contracts was recognized by the legislature as early as 1757.<sup>6</sup>

Part I of this article discusses the dangers of adhesion contracts, particularly in the online context, where they are most susceptible to abuse. In Part II, we discuss foundational contract principles, specifically the transition from feudalism to freedom of contract and the dramatic shift in the meaning of “freedom of contract” over time. We begin Part III with a conceptual exploration of how to define an adhesion contract. We then discuss the history of adhesion contracting, from early posted notices and over a century of judicial fracas about whether and when to enforce contract terms printed on tickets, bills of lading, receipts, and so forth. We describe how a field of law based on the freedom of the serfs and knowing choice developed to pre-printed, non-negotiable, universal terms on a form accepted by implication. In Part IV, we continue with the developments of the twentieth century, marked by the promulgation of the *Uniform Commercial Code* (“UCC”), *Restatement (Second) of Contracts*, and consumer protection efforts of the 1960s and 1970s. Part V describes the erosion of the unconscionability doctrine, the need for knowing assent, notice, and other boundaries in which adhesion contracts were contained. We discuss the consequence of the resulting imbalance and whether the economic benefits analysis justifies the cost. Part VI returns to feudalism and freedom of contract to illustrate the need to rethink the enforcement of online contracts.

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<sup>4</sup> Edwin W. Patterson, *The Delivery of a Life Insurance Policy*, 33 HARV. L. REV. 198, 222 (1919).

<sup>5</sup> *Id.* at 222 n.106 (citing A. FOUILLÉE ET AL., MODERN FRENCH LEGAL PHILOSOPHY 472, 477 (1916)); 2 MARCEL PLANIOL, TREATISE ON THE CIVIL LAW § 972 (1912); 1 OPPENHEIM’S INTERNATIONAL LAW §§ 532, 533 (Robert Jennings, QC & Arthur Watts, KCMG QC eds., 2d ed. 1912)).

<sup>6</sup> Albert A. Ehrenzweig, *Adhesion Contracts in the Conflict of Laws*, 53 COLUM. L. REV. 1072, 1075 n.17 (1953) (citing RAYMOND SALEILLES, DE LA DÉCLARATION DE VOLONTÉ (1901)).

We conclude that the claim of economic benefits has been allowed to swallow the whole of contract values and that some return to balance is essential.

A simple allegory illustrates the need for balance in the use of adhesion contracts and the risk if the pendulum swings too far one way or the other. Traditional wisdom was once that “you should never give a horse straight alfalfa.”<sup>7</sup> But modern agricultural nutritionists bust this myth, relying on empirical data to show that feeding straight alfalfa is in fact not harmful to the horse.<sup>8</sup> This advice is only half of the equation, however. “*Alfalfa should be limit-fed*—fed in a fixed amount—rather than offered free-choice.”<sup>9</sup> Alfalfa is a good thing, within bounds. Because it is so rich, a horse that eats too much alfalfa becomes fat, gassy, and may die.<sup>10</sup>

Similarly, many principles in law are true, but only within limits or only set in balance with other principles. This balance was foremost in the mind of Karl Llewellyn, one of the most brilliant minds in the development of modern commercial law, when he envisioned a legal system that would allow adhesive contracts. “[I]n a case-law system, the judge[s must] see that the block to which you are indeed assenting as a transaction is carved into some approximation of decent balance in its detail.”<sup>11</sup>

Contract law is now facing a crisis of theory that requires us to consider how far the balance has been lost and how it must be restored. Contractual liability imposed without knowing assent, with burdensome terms, and without an opportunity to negotiate was anathema to traditional contract law. Over time, courts and commentators recognized the benefits of enforcing standard form adhesion contracts, subject to the balancing and bounding afforded by other contract doctrines and exercises of judicial discretion. Now the benefits of adhesion are being over-emphasized and the caveats about being limit-fed are being lost.

Adhesion—the alfalfa of contract law—is being consumed, seemingly without memory of the risks associated with its unbounded

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<sup>7</sup> Lori K. Warren, Ph.D, P.A.S., *Horse Feeding Myths and Misconceptions*, ALBERTA AGRICULTURE, FOOD AND RURAL DEVELOPMENT, [http://distanceriding.org/index.php?option=com\\_content&task=view&id=35&Itemid=53](http://distanceriding.org/index.php?option=com_content&task=view&id=35&Itemid=53) (last visited July 20, 2012).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* (emphasis in original).

<sup>10</sup> *Id.*

<sup>11</sup> Karl N. Llewellyn, *Book Review*, 52 HARV. L. REV. 700, 703 n.7 (1939) (emphasis omitted) [hereinafter Llewellyn, *Book Review*].

use. In law, the result is that the rich get all the more fat and gassy. In short, this Article is about how we ended up stuck with surprisingly onerous online contracts<sup>12</sup> and an idea of how to get unstuck.

This Article first reviews the nature of sticky online contracts in comparison to historical adhesion paper contracts. It then posits the current state of adhesion contract practices in their historical and theoretical context. We do not attempt to construct a detailed picture of three centuries of contract thinking, but we do condense an overview of the history of adhesion contracts through the changing tides of economic policy, contract law, and technology marketing. We also explain that the balance upon which adhesion contracts were originally justified is not honored by modern contract law.

We propose that, while contracts of adhesion are here to stay, the protective principles that originally accompanied their acceptance should still be considered a condition of their use. This is particularly true in cyber-contracting, where contracts of adhesion grow malignantly. While we have been sleeping for half a century, the fundamental principle of choice in contract law and the balanced wisdom of the Realists<sup>13</sup> has been lost, co-opted by commercial dynasties that have simply replaced the oppression of the King with the oppression of an economic superior bargaining power. Cyberspace, instead of being free, open, and liberating,<sup>14</sup> is emerging as a feudal system controlled by contract.<sup>15</sup>

## I

### ADHESIVE ONLINE CONTRACTS: MORE DANGEROUS THAN LICKING CHEAP ENVELOPES

Adhesive, preprinted contracts supplied by repeat players in the market are extremely convenient, time-efficient, and cost-effective for the parties who have the power to choose.<sup>16</sup> For this reason,

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<sup>12</sup> If you doubt this claim, we suspect you are a compulsive clicker and just have not read enough of them. *See infra* Part I.

<sup>13</sup> *See infra* Part IV.

<sup>14</sup> For a discussion of how the wild-west metaphor for cyberspace has been false and dangerous, see Cheryl B. Preston, *Internet and Pornography: What If Congress and the Supreme Court Had Been Comprised of Techies in 1995-1997?*, 2008 MICH. ST. L. REV. 61 [hereinafter Preston, *Internet and Pornography*].

<sup>15</sup> *See* Alfred C. Yen, *Western Frontier or Feudal Society?: Metaphors and Perceptions of Cyberspace*, 17 BERKELEY TECH. L.J. 1207 (2002).

<sup>16</sup> *See* W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 529-33 (1971) (explaining how standard form contracts were quickly perceived to be efficient and cost-effective, especially as mass-

“[s]tandard form contracts probably account for more than ninety-nine percent of all the contracts now made.”<sup>17</sup> Standard form contracts are the norm across industries.<sup>18</sup>

While the effects of adhesion contracts are similar in the online context to traditional paper contracting in terms of non-negotiability, the use of adhesion contracts online is more alarming. We have discussed at length elsewhere the particular issues arising with online contracts, for instance: (1) lack of effective notice and of clearly demonstrated assent; (2) unlimited space that permits extraordinary length and complexity of terms; (3) extreme provisions and waiver, inserted with the knowledge that users will not read them; (4) lack of ordinary precautions associated with seeing the length and format of a contract before attaching a signature; (5) use in a context marked with speed and instant gratification; and (6) vast number of contract-based transactions in ordinary daily activities.<sup>19</sup> Further discussion of these particulars is unnecessary in this Article. Thus, we only provide a brief summary.

Adhesion contracting was old news by the time the Internet rolled into homes across America.<sup>20</sup> From the moment the first tech-savvy innovators realized they could conduct business online, adhesion contracts became available in electronic form.<sup>21</sup> Perhaps unexpectedly, the Internet then became somewhat of a catalyst to the problems caused by adhesion contracting. Drafters of adhesive contracts who placed their take-it-or-leave-it terms online no longer had some of the same boundaries and incentives that provided practical limitations on adhesion contracts in the traditional contracting context.<sup>22</sup>

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production became the norm); *see also* Robert A. Hillman, *Rolling Contracts*, 71 FORDHAM L. REV. 743, 747 (2002) (claiming that the savings from using standard form contracts may be passed along to consumers).

<sup>17</sup> Slawson, *supra* note 16, at 529.

<sup>18</sup> *See* Friedrich Kessler's oft-cited article, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943) (discussing the convenience that drives the use of standard form contracts and the problems created by eliminating the negotiation process and changing the assent analysis).

<sup>19</sup> *See* Cheryl B. Preston & Eli W. McCann, *Unwrapping Shrinkwraps, Clickwraps, and Browsewraps: How the Law Went Wrong from Horse Traders to the Law of the Horse*, 26 BYU J. PUB. L. 1, 16 (2011).

<sup>20</sup> *See id.* (discussing the use of adhesion contracts online and examining specific examples).

<sup>21</sup> *See id.*

<sup>22</sup> *See id.* at 27.

Adhesion contracts online are typically clickwraps or browsewraps. Clickwrap contracts purport to bind consumers by merely clicking. Although most clicks are required on a button near words mentioning the online contract and containing some version of “I accept,” many are not. One common variant is where a site asks the user to click to establish an account while explaining in the online contract located elsewhere that forming an account constitutes acceptance of the contract terms.<sup>23</sup>

More egregious are browsewraps. Some very commonly used email, retail, and social networking sites contain phrases in their online contracts that claim that the consumer is bound merely by perusing the site’s products and services.<sup>24</sup> Moreover, some websites tuck the contracts with this statement in unlikely places and thus give no effective notice of the legal consequences of browsing the site. Some courts dismiss the problem of notice and suggest that every user should assume that contracts form with the use of a webpages and so additional notice or clicking is not necessary.<sup>25</sup>

Furthermore, there is no longer an economic or psychological incentive for drafters to keep contracts length to a minimum.<sup>26</sup> Where consumers might have balked at 5,000 words printed out over a thick packet of contract pages, these same consumers do not have the cautionary experience of feeling the weight and thickness of the contract in their hands when presented with a tiny hyperlink that leads to terms,<sup>27</sup> nor do they have the ritual of signing to impress upon them the legal significance of their choice. Not only will few follow the link to an online contract, fewer still will scroll down to the

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<sup>23</sup> See *id.* at 19–22 (examining eight common online service providers and explaining the ways in which each purports to bind consumers to their online contracts).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 30 (“[T]here is an obvious and dramatic trend for courts to agree that people should generally be aware that [Terms of Service] exist and therefore everyone has ‘constructive’ notice that terms are there somewhere.”); see also *Register.com, Inc., v. Verio, Inc.*, 356 F.3d 393, 402 (2d Cir. 2004) (rejecting customers’ claim that they lacked notice of online browsewrap terms because using the page several times was enough to be on notice that terms existed).

<sup>26</sup> See Preston & McCann, *supra* note 19 (explaining what pushed early contract drafters toward brevity and how those initial motivations do not exist in electronic contracting); Cheryl B. Preston, *CyberInfants*, 39 PEPP. L. REV. 225, 259 (2012) (explaining some of the psychological effects of signing a contract on paper compared to accepting one electronically).

<sup>27</sup> See Preston & McCann, *supra* note 19 (describing drafter cognizance of the psychological effects of handling a bulky contract); see also Preston, *supra* note 26, at 254 (discussing how online contracts pose new problems, in part because of the length of these contracts).

bottom or count the page equivalents.<sup>28</sup> Add to that the lack of face-to-face interaction between consumer and contract presenter,<sup>29</sup> and no ability to drive to an established local business where a clerk can be found to whom to complain, once a problem has arisen. As we explain:

Consumers are entering into contracts on such a regular basis that it is no longer a significant event to assent to an agreement, as it may have been before products and services became so available through the Internet. And beyond the sheer number of contracts, the lack of formalities in contract acceptance online further strip the consumer of awareness she may have had in traditional paper contracting where the parties might drive to a meeting-place, thumb through documents, and apply a physical signature. Rather, with online contracting, the consumer can sit at her computer in her sweats and immediately begin using online services by merely clicking a button. Little time or effort is involved during which a customer might reconsider. Even if she did take the time and effort to read through the agreement, she does not have much chance of finding someone who can explain it and less chance of negotiating any changes.<sup>30</sup>

Because consumers do not find or read online contracts,<sup>31</sup> particularly egregious terms seem to go unnoticed. Common now in online contracts are unilateral modification clauses; some permit the drafter to add or change terms at will without notice.<sup>32</sup> Some suggest the user is responsible for reading the terms with each use, and thus proceeding to use the page is a manifestation of assent to whatever version of the terms is included.

Jury waiver, venue restrictions, and arbitration clauses are also standard in many online contracts.<sup>33</sup> Many include a transfer of intellectual property rights.<sup>34</sup> For instance, Facebook's user agreement requires the user to grant "a non-exclusive, transferable,

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<sup>28</sup> See Preston & McCann, *supra* note 19, at 18, 27 (discussing the common consensus that drafters often do not take steps to encourage consumers to actually read their contracts, and consumers in turn do not bother).

<sup>29</sup> See Preston, *supra* note 26, at 259–62 (noting the ways in which face-to-face negotiating affects the consciousness of contract acceptance).

<sup>30</sup> Preston & McCann, *supra* note 19, at 27–28.

<sup>31</sup> See *id.* (discussing the regularity with which consumers click to accept without actually viewing the online contract).

<sup>32</sup> *Id.* at 23–25 (considering a few examples of modification clauses in common online contracts and briefly discussing their effect).

<sup>33</sup> *Id.* at 25 (considering examples of each of these in common online contracts); Preston, *supra* note 26, at 263.

<sup>34</sup> Preston & McCann, *supra* note 19, at 26–27; Preston, *supra* note 26, at 264 (offering a number of examples of these in common online contracts).



sub-licensable, royalty-free, worldwide license to use any IP content that you post on or in connection with Facebook.”<sup>35</sup> Online contracts contain unreasonably broad waivers,<sup>36</sup> and sometimes two or three versions of waivers in the same contract.<sup>37</sup> And why not? The space on a website is endless.

Although courts expressed some concern a decade ago, they now generally assume the validity of clickwraps without inquiry and also tend toward enforcing browswraps regardless of their length, notice, or content.<sup>38</sup> Rather than scrutinize formation or even notice, opinions include pronouncements that clickwrap agreements “are valid and enforceable contracts”<sup>39</sup> or “are ubiquitous and have been consistently upheld by courts.”<sup>40</sup>

What follows is an overview of the development of contract law, from formation to its current state. This context illustrates that the

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<sup>35</sup> *Statement of Rights and Responsibilities*, FACEBOOK, INC., ¶ 2.1, <http://www.facebook.com/legal/terms> (last visited July 20, 2012).

<sup>36</sup> See Preston, *supra* note 26, at 264-65.

<sup>37</sup> See, e.g., *Terms of License for PDF Annotator, Conditions of Use*, GRAHL SOFTWARE DESIGN (Mar. 27, 2012), <http://www.ograhl.com/pdfannotator/std/en/License.txt> (“To the maximum extent permitted by applicable law, Grahl . . . disclaims all warranties . . . .”); AMAZON.COM (Aug. 19, 2011), [http://www.amazon.com/gp/help/customer/display.html/ref=footer\\_cou?ie=UTF8&nodeId=508088](http://www.amazon.com/gp/help/customer/display.html/ref=footer_cou?ie=UTF8&nodeId=508088) (“To the full extent permissible by applicable law, Amazon disclaims all warranties . . . .”). Amazon’s 2,628-word, five-page, single-spaced Conditions of Use is a browswrap that purports to be binding “[i]f you visit or shop at Amazon.com.” *Id.* (emphasis added).

<sup>38</sup> See Preston & McCann, *supra* note 19, at 29 (noting a number of cases that recognize this trend).

<sup>39</sup> *Centrifugal Force, Inc. v. Softnet Commc’n, Inc.*, No. 08 Civ. 5463(CM)(GWG), 2011 WL 744732, at \*7 (S.D.N.Y. Mar. 1, 2011) (citing *Moore v. Microsoft Corp.*, 741 N.Y.S.2d 91, 92 (N.Y. App. Div. 2002)) (holding that because the customer could not have proceeded to use software without clicking to accept terms, the customer did, in fact, accept the terms); see also, e.g., *Segal v. Amazon.com, Inc.*, 763 F. Supp. 2d 1367, 1369 (S.D. Fla. 2011) (quoting *Salco Distribs., LLC v. iCode, Inc.*, No. 8:05 CV 642 T 27TGW, 2006 WL 449156, at \*2 (M.D. Fla. Feb. 22, 2006)) (“In Florida and the federal circuits . . . clickwrap agreements are valid and enforceable contracts.”).

<sup>40</sup> *Schnabel v. Trilegiant Corp.*, No. 3:10-CV-957 JCH, 2011 WL 797505, at \*6 n.8 (D. Conn. Feb. 24, 2011) (citation omitted); see also *Smallwood v. NCsoft Corp.*, 730 F. Supp. 2d 1213, 1225 (D. Haw. 2010) (citing a number of cases to show that most courts find clickwrap agreements to be enforceable); *Meier v. Midwest Recreational Clearinghouse, LLC*, No. 2:10-cv-01026-MCE-GGH, 2010 WL 2738921, at \*3 (E.D. Cal. July 12, 2010) (noting that forum selection clause was not invalid simply because it was part of a clickwrap agreement); *Exceptional Urgent Care Ctr. I, Inc. v. Protomed Med. Mgmt. Corp.*, No. 5:08-cv-284-Oc-10GRJ, 2009 WL 1370818, at \*10 (M.D. Fla. May 14, 2009) (“There is also no dispute over the validity of clickwrap agreements . . . .”); *Jackson v. Am. Plaza Corp.*, No. 08 Civ. 8980 (PKC), 2009 WL 1158829, at \*4 (S.D.N.Y. Apr. 28, 2009) (arguing that courts no longer seriously dispute the enforceability of clickwrap agreements).

acceptance of adhesion contracts—notwithstanding the violence done to contract doctrine—was predicated on the existence of parameters and policing options to constrain abuses.

## II

### BIRTHING CONTRACTIONS OF CONTRACT LAW PRINCIPLES

Initially, freedom of contract was the right of weaker parties to autonomy from those who would overreach.<sup>41</sup> At the time, the powerful and overreaching party was the crown, the lord of the manor, or the unfettered judiciary who could unilaterally lay down the law. Then, the status of a man as a serf, for instance, governed the range of his actions. The “freedom of contract” notion was a step away from status limitations toward choice. In theory, people could choose which duties and obligations they wished to assume in exchange for benefits, rather than being born into a fixed relationship of rights and obligations. The aspiration was that “men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice.”<sup>42</sup>

The ability of every man<sup>43</sup> to control his life by choosing when to enter a contract “flattered the sense of individual self-sufficiency which was so large a part of the sense of freedom.”<sup>44</sup> “Men ought to be bound only when they deliberately chose to be and to the extent that they chose.”<sup>45</sup> This freedom of contract became a lofty statement of core contract values.

The freedom to contract arose in response to feudal lords’ exploitation of serfs despite superficial grants of land benefits.<sup>46</sup>

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<sup>41</sup> See Kessler, *supra* note 18, at 636 (arguing that early contract doctrines, such as freedom of contract, sought to protect weak parties from overreaching by economically stable repeat players who could craft grossly one-sided terms and enforce them against the weaker party).

<sup>42</sup> *Printing and Numerical Registering Co. v. Sampson*, (1875) 19 L.R. Eq. 462 (Ch.) 465 (Sir G. Jessel M.R.).

<sup>43</sup> And in those days they meant “man.”

<sup>44</sup> Max Radin, *Contract Obligation and the Human Will*, 43 COLUM L. REV. 575, 576 (1943).

<sup>45</sup> *Id.*

<sup>46</sup> Yen, *supra* note 15, at 1235–36 (citing DANIEL R. COQUILLETTE, *THE ANGLO-AMERICAN LEGAL HERITAGE* 98 (1999)); see also Katherine R. Guzman, *Give or Take an Acre: Property Norms and the Indian Land Consolidation Act*, 85 IOWA L. REV. 595, 643 (2000). The generalization of feudalism is subject to exceptions, but the quintessential aspects of feudalism used for this discussion are widely accepted. See *id.*; Richard J. Lazarus, *Debunking Environmental Feudalism: Promoting the Individual Through the*

Because of functional requirements of time and space, manor lords had extreme discretion over their manors and the ability to act with relative impunity.<sup>47</sup> Thus, the king's justice was largely theoretical; lords dispensed the law with little to no kingly oversight.<sup>48</sup> The agreement between manor lord and serf, contrary to the fealty agreement between lord and king, was general, extensive, and open-ended.<sup>49</sup> With the lord keeping the most fertile land, he may have allocated land to his serfs, but these land grants were more like a chain than a boon.<sup>50</sup> The benefits of this agreement were allocated unfairly, with the lord enjoying bounty at the serf's expense.<sup>51</sup> This one-sided relationship created a clear division of haves and have-nots. If serfs were able to escape to neighboring manors, they would still be serfs.<sup>52</sup>

Over time, the meaning of freedom of contract changed. In 1937 in *West Coast Hotel Co. v. Parrish*, the U.S. Supreme Court explained that the power to abridge the freedom of contract "could only be justified by the existence of exceptional circumstances."<sup>53</sup> At the time, the concept of "freedom of contract" focused on giving parties a choice to enter contracts or not.<sup>54</sup> The principle transformed from a celebration of individual choice and empowerment in creating a contract into the assumption that courts should enforce contracts imposed without choice.<sup>55</sup> This leap from creation to enforcement may seem superficial, but it is not. The principle moves from abstract

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*Collective Pursuit of Environmental Equality*, 77 IOWA L. REV. 1739 (1992); Douglass C. North & Robert Paul Thomas, *A Rise and Fall of the Manorial System: A Theoretical Model*, 31 J. ECON. HIST. 771 (1971).

<sup>47</sup> Yen, *supra* note 15, at 1234. Limits on the lord were explicit and specific, defined when swearing fealty. *Id.*

<sup>48</sup> See *id.* at 1234 (explaining that delegation of "judicial, police and regulatory powers" became necessary "as a matter of practical necessity").

<sup>49</sup> *Id.* at 1235.

<sup>50</sup> The serf became "tied to the soil" and was required to stay the property of the manor even if there was a change in lords. *Id.* at 1236.

<sup>51</sup> The lord's land was tended first. If the serf had time to tend to his land, his crop was taxed as well. *Id.* at 1235.

<sup>52</sup> *Id.* at 1236.

<sup>53</sup> *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 406 (1937).

<sup>54</sup> See *id.* at 406–07 (explaining that there were specific exceptions where the Court "from time to time had upheld statutory interferences with the liberty of contract").

<sup>55</sup> See *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 11 (1972) (quoting *Nat'l Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 315–16 (1964)) (internal quotation marks omitted) (explaining that a clause or contract where "parties . . . agree in advance to submit to the jurisdiction of a given court . . . or even to waive notice altogether" is enforceable at least in part because "[i]t accords with ancient concepts of freedom of contract").

analysis of *possible* contracts into validating *actual* contracts, even if they would not qualify as contracts when the principle emerged.<sup>56</sup>

Arguably, this *new* freedom of contract is at odds with protective doctrines like duress and unconscionability. It urges enforcement unless abridged by “the existence of exceptional circumstances.”<sup>57</sup> Further, this new freedom of contract entered the game with a strong backing of constitutional connection and free market appeal.

Ironically, freedom of contract has undergone a diametric shift to reinstate the original status-based power. Freedom of contract is used to justify the enforcement of a myriad of contract terms that the weaker party could not have comprehended or negotiated.<sup>58</sup> Although couched in terms of allowing individuals to enter “bad deals,” freedom of contract, or today’s right of the powerful to privatize law, has become an argument that the powerful ought to be free to exercise their power without interference from others.<sup>59</sup>

Through expansion of freedom of contract, the U.S. Supreme Court opened the door for feudalistic contracting.<sup>60</sup> Adhesive contracts, without proper limitations, behave much like the manorial system back in feudal England. In the adhesive contract context, corporate lords and consumer serfs are simply fulfilling their manorial system roles with little oversight or restriction from the king. Acting as the modern-day king, the Court seems to grant considerable discretion to corporate lords in drafting adhesive contracts, citing the functional requirements of mass consumer contracting and economic benefits as its justification.<sup>61</sup> And corporate lords appear to draft with relative impunity.<sup>62</sup>

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<sup>56</sup> The Court explained that the clause was *prima facie* enforceable “absent some compelling and countervailing reason.” *Bremen*, 407 U.S. at 12. Interestingly, this language mirrors the language in *West Coast Hotel* requiring exceptional circumstances. The *Bremen* Court mentions “fraud, undue influence, [and] overweening bargaining power,” passing over them brusquely and not mentioning how important they are and exactly what role each may play. *Id.*

<sup>57</sup> *West Coast Hotel*, 300 U.S. at 406.

<sup>58</sup> See Kessler, *supra* note 18, at 635 (discussing the idea that doctrines developed to protect weaker parties from overreaching).

<sup>59</sup> See Henry S. Noyes, *If You (Re)build it, They Will Come: Contracts to Remake the Rules of Litigation in Arbitration’s Image*, 30 HARV. J.L. & PUB. POL’Y 579, 595–96, 638 (2007) (discussing the “new” freedom of contract and its implication on private ordering, especially in relation to arbitration agreements).

<sup>60</sup> See *infra* Part VI for further discussion of the feudalism analogy.

<sup>61</sup> *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593–94 (1991) (noting the economic benefits of mass form contracting); see also *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1149–50 (7th Cir. 1997) (explaining the economic considerations alleged to

The corporate lords maintain the best provisions and hold general and extensive waivers over the consumer serfs. These agreements clearly allocate benefits unfairly, giving corporate lords protections and benefits at the consumer serfs' expense. Even perceived consumer benefits act against the consumer, as corporations attempt to draft in modest concessions in the hope that they will mollify consumer objections to the remaining provisions.<sup>63</sup> Here, one-sided contracts create protective haves and have-nots. Much like serfs unable to escape the manorial system, consumer serfs are stuck with terms of service and other adhesive contracts—at least if they want to consume anything.

Additionally, the corporate lords dictate the terms and the consumer serfs are at their mercy.<sup>64</sup> Judge Richard Posner argues that this dynamic likely leads to efficient outcomes because corporations will not take advantage of unbalanced terms fearing reputational costs.<sup>65</sup> Now, with efficiency as the rationalization, it appears that consumers are at the mercy of drafters, facing imbalanced terms on paper, with discretionary enforcement squarely at the option of the corporate lord.<sup>66</sup>

Further, the new freedom of contract condones this dynamic by relying on the presumption that any such consumer is free to make a bad deal. But what do we mean by “deal”? Simply put, one-sided

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justify the use of adhesion contracts); *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1452 (7th Cir. 1996); Preston & McCann, *supra* note 19, at 11–12.

<sup>62</sup> See *infra* Part VI.

<sup>63</sup> For example, AT&T asked the U.S. Supreme Court to deny granting certiorari on a case involving its consumer contracts because AT&T intended to introduce more consumer-friendly terms into its next generation of contracts. Brief of AT&T Mobility LLC as Amicus Curiae in Support of Neither Party, *T-Mobile USA, Inc. v. Laster*, 553 U.S. 1064 (2008) (No. 07-976), 2008 WL 534808, at \*19-21; see also Frank Blechschmidt, *All Alone in Arbitration: AT&T Mobility v. Concepcion and the Substantive Impact of Class Action Waivers*, 160 U. PA. L. REV. 541, 563 (2012); Aaron Bruhl, *AT&T's Long Game on Unconscionability*, PRAWFSBLAWG (May 5, 2011, 9:40 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2011/05/atts-long-game-on-unconscionability.html>.

<sup>64</sup> See Yen, *supra* note 15, at 1254 (“Enforcement of adhesion contracts between cyberlords and cyberserfs is another example of how the feudalism metaphor might affect the application of law to cyberspace.”); Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets*, 104 MICH. L. REV. 827, 828 (arguing that opportunistic behavior of the seller will be dissuaded by reputational considerations, that one-sided contracts allow for the seller to be discretionary, and that despite unfair terms on paper, the contract will be “implemented in a balanced way”).

<sup>65</sup> Bebchuk & Posner, *supra* note 64, at 828.

<sup>66</sup> *Id.*

consumer contracts combined with the new freedom of contract are dangerous.<sup>67</sup>

### III

#### FROM AGREEMENT TO ADHESION

Today's courts faced with online contracts generally claim to apply traditional justifications and principles that supported pre-technology contracts.<sup>68</sup> Some courts recognize how new applications weaken these principles.<sup>69</sup> Some acknowledge the doctrines that were intended to balance the adoption of adhesive contracts and refer to consumer protection principles, such as unconscionability.<sup>70</sup> But, outside of the mandatory arbitration context, almost no courts invalidate online contracts on these grounds.

##### *A. Conceptual Definitions of Adhesion in Contract Law*

The designation "adhesion" may not have been used until commentators began to criticize the practice, but the existence of contracts of adhesion is much older. Contracts where one party assents because there is no other reasonable choice always coexists with power disparities. Parties may have signed, sealed, and sworn in front of witnesses their agreement to certain contract terms as a result of various life exigencies, or express or implied duress, however subtle.

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<sup>67</sup> The U.S. Supreme Court first expanded the freedom of contract in cases involving savvy businesses. *See Noyes, supra* note 59. Later, it was expanded to apply to consumers, even in contracts in which formation purportedly occurred before the terms were available. *See Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991).

<sup>68</sup> *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 33 (2002) (noting that *Hill* and *Brower*, two cases discussing "terms later" or "rolling" contracts where acceptance happens before the terms are revealed, "do not differ markedly from the cases involving traditional paper contracting"); *see also* *Feldman v. Google, Inc.*, 513 F. Supp. 2d 229, 236 (E.D. Pa. 2007) ("To determine whether a clickwrap agreement is enforceable, courts presented with the issue apply traditional principles of contract law and focus on whether the plaintiffs had reasonable notice of and manifested assent to the clickwrap agreement.").

<sup>69</sup> *See infra* Part IV (Llewellyn discussing the importance of maintaining strong protections like unconscionability when allowing standard form contracts to be enforceable); *Conwell v. Gray Loon Outdoor Marketing Group, Inc.*, 906 N.E.2d 805, 812 (2009) ("[W]hen courts try to pour new wine into old legal bottles, we sometimes miss the nuances.").

<sup>70</sup> *See infra* notes 224–26 (citing cases discussing unconscionability concerns with online contracts).

Being compelled to accept a contract because of unfortunate circumstances beyond a party's control, however, does not make a contract adhesive. Such compulsion does not necessarily indicate lack of extended negotiation between the parties before reaching the final terms, less than a full understanding of the import of the terms, or inadequate evidence of express assent. Such a choice could be made with full knowledge and volition, even if unpleasant. These are not adhesion contracts, and formation abuses in such situations can be policed with the doctrine of duress.

Even outside of cases of external pressure and duress, defining adhesion contracts is problematic. We can conceive of adhesion contracts as contracts where a weaker party has no opportunity to negotiate. A party may be unable to negotiate because of a power imbalance. Or, the inability to negotiate may be traceable to the fact that the terms are standard, imposed in a large number of similar transactions by a repeat player. The resistance to negotiating changes may be a natural feature of the fact that the forms are already printed. More likely, changes are precluded by the cost of training employees to answer questions and make decisions in individual cases. Even if a business provides a forum for consumers to ask their questions, the person on the other end is likely a lower-level employee trained only to refuse requests for changes.

Although non-negotiability is a significant factor in identifying an adhesion contract, it is not the only factor for purposes of analysis. A non-negotiable contract may still require an overt manifestation of knowing assent. In contrast, an adhesion contract is one that purports to form, or "adhere" to the weaker party, without any overt manifestation of assent, such as signing. In fact, formation may occur without any reason to assume the weaker party is aware of the terms or even cognizant that a contract exists.

### *B. The Origins of Contract by Notice*

With the proliferation of the merchant class and the development of high-speed printing presses, various industries began providing customers with pre-printed statements of contract terms and bypassing a signature requirement or other individualized expression of assent.<sup>71</sup> In the most complex cases, the terms were printed on

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<sup>71</sup> See *infra* Part B.1. For further discussion, see Cheryl B. Preston, Boilerplate from the Beginning (2012) (unpublished manuscript) (on file with author).

paper that served other functions, such as railroad tickets,<sup>72</sup> bills of lading,<sup>73</sup> and receipts.<sup>74</sup> At some point common law judges slouched toward a shady theory of contract by notice, meaning that the powerful party had posted the terms that could serve as a defense against lawsuits initiated by customers, which we discuss in this section.

### 1. *Posted Notices in Dicta*

Most early courts resolved disputes involving posted terms without having to rule on the contract formation issues. As happens with some precedents, such as *ProCD, Inc. v. Zeidenberg*,<sup>75</sup> which we discuss elsewhere,<sup>76</sup> and the clickwrap cases,<sup>77</sup> the early courts' precise holdings got lost in the memory of the overall result. The first cases involved customers who admitted to actual awareness to the contents of the notice. Overlooked was the problem of identifying *acceptance* to the new terms. Because the powerful party who posted notice of terms prevailed in earlier cases (although for different reasons), some later courts believed that a contract by notice could be enforced without inquiry into the recipient's knowledge of the terms, not to mention the lack of express acceptance. Businesses did not come together with customers to reach an agreement; they stipulated the terms of agreement.

### 2. *Advertising and Usages of Trade*

One of the first cases dealing with posted terms is *Gibbon v. Paynton* from 1769, in which Lord Mansfield appeared to enforce as a

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<sup>72</sup> *Bissell v. N.Y. Cent. R.R.*, 29 Barb. 602 (N.Y. App. Div. 1859) (holding that exculpatory terms printed on a railroad ticket did not waive carrier's liability for criminal negligence).

<sup>73</sup> *Cole v. Goodwin*, 19 Wend. 251, 276 (N.Y. Sup. Ct. 1938) ("Lord Tenterden, late Abbott, C. J., in his *Treatise on Shipping*, pt. 3, ch. 4, § 8, p. 296, *Story's* ed. of 1822, has left on record an instance, in which he thinks that by the usual exception in the bill of lading, the master may stand protected against a loss by fire.").

<sup>74</sup> *Cole*, 19 Wend. at 277. The court in *Cole* noted that in *Latham v. Rutley*, (1823) 107 Eng. Rep. 290 (K.B.) 290 (Lord Abbott C.J.), the court assumed that "a common carrier by land might give a receipt for goods, 'fire and robbery excepted.'" *Id.*

<sup>75</sup> *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996).

<sup>76</sup> *Preston & McCann*, *supra* note 19, at 8–9 (arguing that *ProCD* has been "expanded beyond what was required by the case" to justify a myriad of exceptions).

<sup>77</sup> *See id.* at 29 n.159 (listing cases where the courts justified the acceptance of clickwrap contracts, in part, because they had been upheld by other courts, without determining if the facts of the present case correspond to the facts of the earlier cases enforcing them).



contract a statement published as an advertisement by the Birmingham Stage Coachman in the local newspaper and distributed locally on hand-bills.<sup>78</sup> A term in the advertisement was that a coachman “would not be answerable for money or jewels or other valuable goods, unless he had notice that it was money or jewels or valuable goods that was delivered to him to be carried.”<sup>79</sup> The customer had the duty to give notice, which then resulted in a higher price than for carriage of other packages.<sup>80</sup>

Lord Mansfield’s opinion suggests that the posted terms were not incorporated into the contract based on the advertisement, but that they had become trade usages of which the plaintiff had actual knowledge.<sup>81</sup> Thus, the plaintiff with knowledge who failed to disclose that such valuables were in his package, presumably to avoid the additional charge, could not escape application of the disclaimer. In addition to charging the plaintiff with actual knowledge, Lord Mansfield cited the plaintiff for fraud, which would excuse the carrier in any event.<sup>82</sup> This case does not, as it is sometimes cited,<sup>83</sup> stand for the proposition that the notice in the advertisement was enforceable as a contract.

Also of significance to Lord Mansfield’s opinion is that the common law imposed strict liability for loss of packages by common carriers.<sup>84</sup> Thus, the court was asked to interpret the notice as a special contract sufficient to override the assumption of liability based on status. Implied in the opinion is that terms by notice would be sufficient, even without a trade usage understanding, in cases implicating well-established liability. In any event, the case makes clear that by 1769, repeat players were attempting to form contracts by notice, although courts were not exactly biting.

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<sup>78</sup> *Gibbon v. Paynton*, (1769) 98 Eng. Rep. 199 (K.B.) 199.

<sup>79</sup> *Id.* In an earlier case, the court suggests to the carrier that it could have avoided liability by making “a caution for himself, which he omitting and taking in the goods generally, he shall answer for what happens.” *Morse v. Slue*, (1684) 86 Eng. Rep. 159 (K.B.) 159.

<sup>80</sup> *Gibbon*, 98 Eng. Rep. at 199.

<sup>81</sup> *Id.* at 200 (Mansfield, J.).

<sup>82</sup> *Id.*

<sup>83</sup> *Gibbon v. Paynton* “is remarkable as being among the earliest cases, if not the very first case in which the carrier’s notice appears.” *Cole v. Goodwin*, 19 Wend. 251, 266 (N.Y. Sup. Ct. 1938).

<sup>84</sup> *Gibbon*, 98 Eng. Rep. at 200.

### 3. *Acceptance and Regret in England*

In 1794 the court in *Kirkman v. Shawcross* upheld a “notice contract” on the basis of actual knowledge rather than trade usage, allowing “dyers and bleachers” to create liens for past due amounts by virtue of a resolution of the dyers and bleachers association.<sup>85</sup> The resolution was published in Manchester, England newspapers.<sup>86</sup> One judge held without analysis: “There is no reason why the resolutions made by the different manufacturers should not be considered as engrafted upon the agreement between the [parties] . . . by the mutual consent of both.”<sup>87</sup> But another judge approved simply on the basis that liens are on the side of natural justice, missing entirely the formation issue.<sup>88</sup> Again, however, the plaintiff admitted to reading the notice before entering the transaction, which is a requirement overlooked in later cases.

The scope and the merits of the doctrine of contract by notice continued to be hotly contested. Some twenty-five years later, in an 1818 case, a notice posted in the office of a common carrier similarly purported to waive liability for any article “above the value of [five pounds], unless entered and paid for accordingly.”<sup>89</sup> Justice Park refused to allow the posted terms to override liability, finding that “[t]he doctrine of carriers exempting themselves from liability by notice has been carried much too far.”<sup>90</sup> Justice Burroughs “lament[ed] that the doctrine of notice was ever introduced.”<sup>91</sup> Justice Burroughs denied that a special contract could thus form and, in any event, he found that it was rebutted by proof of “positive negligence.”<sup>92</sup>

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<sup>85</sup> *Kirkman v. Shawcross*, (1794) 101 Eng. Rep. 410 (K.B.) 412 (Lord Kenyon C.J.).

<sup>86</sup> *Cole*, 19 Wend. at 272 (citing *Kirkman*, 101 Eng. Rep. at 410).

<sup>87</sup> *Kirkman*, 101 Eng. Rep. at 412.

<sup>88</sup> *Id.* at 413.

<sup>89</sup> *Smith v. Horne*, (1818) 129 Eng. Rep. 338 (C.P.) 338. A slightly different version of the case is apparently recorded in 2 Moor. 18. This is the source that the judge in *Cole* cites, although we use the official report unless noted otherwise.

<sup>90</sup> *Id.* In *Cole*, the court quotes Justice Park’s words in the version of the case as recorded in 2 Moor. 18: “The indulgence given to carriers by limiting their responsibility by the notices usually affixed in their offices, has occasioned great public inconvenience. The courts have lately been inclined to restrain them.” *Cole*, 19 Wend. at 263 (N.Y. Sup. Ct. 1838).

<sup>91</sup> *Smith*, 129 Eng. Rep. at 338-39.

<sup>92</sup> *Id.*

#### 4. Ongoing Dispute in the United States

United States courts considering the question of contracts by notice determined that the common law at the time of the revolution, and thus binding on U.S. courts, was against allowing waivers of liability by notice. “[I]t is made manifest that in 1776, by the common law, a carrier could not limit or modify his extraordinary responsibility by notice. . . . It may be safely asserted that the American decisions, with scarcely an exception, sustain the old common law doctrine.”<sup>93</sup> In *Fish v. Chapman*, the Supreme Court of Georgia admitted that, since the American Revolution, England had begun to enforce contracts by notice; but, even so, “a carrier cannot by special agreement exempt himself from all responsibility, so as to evade altogether the policy of the law.”<sup>94</sup>

The *Fish* court’s stated policy for the U.S. position echoes our concerns with the power imbalance of businesses and consumers, although with nineteenth century literary flare:

Strong in associated wealth; strong in the mind which is usually enlisted in their management; and yet stronger, far stronger, in the large immunities and extraordinary privileges with which their charters invest them. If these, as carriers, can vary their liability at all, at what limits does the power stop? where [sic] are its boundaries? Outside of the obligations which their charters impose, there would be neither bounds nor limitations; the citizens would be at their mercy, bound by their power and subject to their caprices.<sup>95</sup>

It is useful to note the reluctance expressed during the years the courts struggled with the questions that were later decided in favor of power and efficiency. These concerns should still temper our enforcement of adhesion contracts.

The *Fish* court in 1847 found that the explosion of technology mandated the need for restricting the power to contract by notice, rather than expanding it.

This is an age of railroads, steamboat companies, stage companies, locomotion and transportation. It is an era of stir—men and goods run to and fro—and common carriers are multiplied. The convenience of the people and safety of property depend more now, I apprehend, upon the rules which regulate the liability of these public ministers than at any other period of the world’s history.<sup>96</sup>

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<sup>93</sup> *Fish v. Chapman*, 2 Ga. 349, 359–60 (1847).

<sup>94</sup> *Id.* at 359.

<sup>95</sup> *Id.* at 361–62.

<sup>96</sup> *Id.* at 358.

For purposes of understanding the intellectual history of adhesion contracts in the United States, the most interesting case is *Cole v. Goodwin* from 1838,<sup>97</sup> in which Justice Cowen provided a thorough review of efforts by common carriers to waive liability by posted terms. In *Cole*, the court acknowledged the arguments still used for enforcing adhesion contracts. For example, the court quotes Justice Best in support of the proposition that printed notices may be justified for the sake of efficiency: “It would be inconvenient, perhaps impossible, to have a formal contract made for the carriage of every parcel . . . .”<sup>98</sup> This argument of convenience and expense is, of course, familiar to us as the basis for defending contracts of adhesion.

Judge Cowen in *Cole*, however, did not see efficiency as the end of the inquiry. He asked:

Where is the boundary? [Some say] the carrier himself is to prescribe it. If this be so, it is easy to see that the common law is overcome, for . . . if this question were entrusted to the party instead of the law,<sup>99</sup> the fences against damage and loss would [not] stand for a moment.

Judge Cowen described waivers by notice as changing the agreement from “give me a due reward, and I will be accountable as a common carrier” to “‘give me the same reward,’ (for the carrier fixes it; it may be less, but it may also be more,) ‘and yet, I claim to throw all risk upon you, or such a degree of it as I please.’”<sup>100</sup> Although Judge Cowen thought the folly of this approach was obvious, such are the common circumstances of today’s adhesion contracts.

The dispute raged in the United States, as well as England, throughout the 1800s. The U.S. Supreme Court in 1848 in *New Jersey Steam Navigation* refused to honor terms

implied or inferred from a general notice to the public . . . which may or may not be assented to. . . . The burden of proof lies on the carrier, and nothing short of an express stipulation by parol or in writing should be permitted to discharge him from duties which the law has annexed to his employment.<sup>101</sup>

As the doctrine progressed, some early U.S. courts resisted finding terms printed on tickets binding because, as some current courts may

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<sup>97</sup> *Cole v. Goodwin*, 19 Wend. 251 (N.Y. Sup. Ct. 1838).

<sup>98</sup> *Id.* at 266 (quoting *Riley v. Horne*, (1828) 130 Eng. Rep. 1044 (C.P.) 1045 (Best C.J.)).

<sup>99</sup> *Cole*, 19 Wend. at 273–74.

<sup>100</sup> *Id.*

<sup>101</sup> *N.J. Steam Navigation Co. v. Merchs.’ Bank*, 47 U.S. (6 How.) 344, 382–83 (1848).

agree, a person given a paper that primarily serves another function as a receipt or means of retrieval of property does not conceive of it as a legal contract and therefore should not be enforced as one.<sup>102</sup> In the context of railway tickets, for example, “a passenger’s ticket is ordinarily a check showing that fare has been paid, and he has no reason to suppose that he is entering into a contract.”<sup>103</sup> Other courts were more apt to hold those terms valid if users were allowed sufficient time to familiarize themselves with the terms.<sup>104</sup>

### 5. *Academics Weigh In*

The enforceability of contracts by notice was one of the very first issues considered significant enough to be reviewed in the newly emerged genre of law reviews. In the 1887 volume of the *Harvard Law Review*, an article begins with a discussion of a leading case before the House of Lords in England where the majority of the lords “were inclined to look on a ticket as a receipt or voucher” and not a contract.<sup>105</sup> The article then concludes that the dissenting position was more persuasive in England and “the decided tendency is to hold that a ticket is a contract; and it seems certain that the American courts will, before many years pass, come into general agreement with the English courts.”<sup>106</sup>

However, these “contracts” are of a different species than contracts by agreement: “[T]he theory naturally suggests itself that a ticket is not a consensual, but a formal, contract. . . . As a matter of fact it is evident that a ticket derives all its validity from the custom. The necessary elements of a consensual contract are wanting.”<sup>107</sup> In addition, the author suggested that, to be enforced based on notice, terms should be conspicuous with “a peculiar color, or other distinguishing mark.”<sup>108</sup>

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<sup>102</sup> See, e.g., *Rawson v. Pa. R.R.*, 48 N.Y. 212, 217 (1872) (“It is a mere token or voucher adopted for convenience to show that the passenger has paid his fare from one place to another. The contract between these parties was made when the plaintiff bought her ticket, and the rights and duties of the parties were determined.”).

<sup>103</sup> *Kansas City, St. J & C.B.R. Co. v. Rudebaugh*, 15 P. Rep. 899, 902 (Kan. 1887).

<sup>104</sup> Compare *Wheeler v. Oceanic Steam Navigation Co.*, 25 N.Y.S. 578, 582-83 (N.Y. Gen. Term 1893), with *Zimmer v. N.Y. Cent. & Hudson River R.R.*, 137 N.Y. 460, 464 (1893).

<sup>105</sup> Joseph H. Beale, Jr., *Tickets*, 1 HARV. L. REV. 17, 19 (1887) (citing *McCrae v. Marsh*, 78 Mass. (12 Gray) 211, 211 (1858); *Burton v. Scherpf*, 83 Mass. (1 Allen) 133, 133 (1861)).

<sup>106</sup> *Id.* at 22.

<sup>107</sup> *Id.* at 25–26.

<sup>108</sup> *Id.* at 30.

A decade later, the discussion had evolved to whether failure to read was a valid excuse against the imposition of contract terms. In 1908, the *Yale Law Review* discussed the continuing split of opinion on whether the terms printed on a ticket bound a passenger in the absence of actual knowledge of them.<sup>109</sup> The author advocated a moderate “most reasonable rule” that would excuse passengers from application of the terms only if the failure to read, or have someone else read the terms to them, was not merely careless.<sup>110</sup>

#### 6. Early Twentieth Century Acceptance with Boundaries

By the turn of the century, however, the trend had shifted to enforcing waivers of liability and other restrictions in terms on the back of non-negotiated, unsigned tickets, and other documents. In 1905 a New York court in *Collister v. Hayman* held that theater owners could “make it a part of the contract and a condition of admission, by giving due notice and printing the condition in the ticket.”<sup>111</sup> Although courts gradually accepted adhesion contracts, they were initially quite willing to police boundaries. “Common carriers must not understand . . . that they can impose any terms which they please upon persons who send goods.”<sup>112</sup> Courts refused to enforce contracts by notice if their scope was too wide or their terms too outrageous. In *Oppenheim v. Russell*, one judge declared that a particular notice was “so manifestly *unreasonable and monstrous*, that . . . no legal agreement can be implied from such a notice.”<sup>113</sup> Early on a distinction was made between waivers of mere negligence and waivers of misconduct.<sup>114</sup>

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<sup>109</sup> *Recent Cases, Carriers—Limitation of Liability—Notice to Passenger*.—French v. Merchants’ & Miners’ Transp. Co., 85 N.E. 424 (Mass.), 18 YALE L.J. 61 (1908). Compare Potter v. Majestic, 56 F. 244 (S.D.N.Y. 1893) (finding that a passenger was not bound to a notice printed on the back of a ticket and not referred to in the body of the ticket when the passenger had not read it), with Gulf C. & S. F. Ry. Co. v. Riney, 92 S.W. 54 (Tex. Civ. App. 1906) (finding a passenger bound to the legal effect of the conditions on the ticket whether read or not). See also *Recent Case, Carriers — Tickets — Notice of Limitation upon Time for Use*, 16 HARV. L. REV. 139 (1902) (comparing cases on various sides of this issue).

<sup>110</sup> *Carriers—Limitation of Liability—Notice to Passenger*, *supra* note 109.

<sup>111</sup> *Collister v. Hayman*, 76 N.E. 20, 21 (N.Y. 1905).

<sup>112</sup> *Cole v. Goodwin*, 19 Wend. 251, 273 (N.Y. Sup. Ct. 1838) (quoting *Nicholson v. Willan*, (1804) 2 Smith 107 (K.B.) 113 (Lawrence J.)) (internal quotation marks omitted).

<sup>113</sup> *Id.* at 273 (quoting *Oppenheim v. Russell*, (1802) 127 Eng. Rep. 24 (C.P.) 30 (Chambre J.)).

<sup>114</sup> *Lyon v. Mells*, (1804) 102 Eng. Rep. 1134 (K.B.) 1135; see also *N.J. Steam Navigation Co. v. Merchs.’ Bank*, 47 U.S. (6 How.) 344, 368–69 (1848).

In the twentieth century, while this early, shaky doctrine of contract by notice led to general acceptance of contracts of adhesion, courts continued to articulate boundaries and conditions. These implied or formal contracts, rather than contracts by agreement, became subject to protective doctrines that were established as conditions to enforcement. These augmented the specific limitations articulated in early cases accepting contracts by notice, discussed in the prior subsection.

The common law included a version of unconscionability doctrine where courts found creative ways to refuse to enforce terms that felt overreaching, usually by relying on other contract doctrines or interpreting the terms against the drafter.<sup>115</sup> Regulation of unfair practices and terms in contracting was naturally within the purview of courts of equity.<sup>116</sup> Eventually, courts of law took over this function.<sup>117</sup> The U.S. Supreme Court in 1889 held a bargain to be unconscionable in an action at law if it was “such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other.”<sup>118</sup>

Even if not characterized as “unconscionability” analysis, during the rise of adhesion contracting, judges still believed they had an honorable, if not holy, duty to come up with some explanation—no matter how stretched—to find a contract or a particular term unenforceable in disturbing circumstances.<sup>119</sup> As early as 1919, commentators complained that “[w]hile the consideration of public policy does not seem to have been strong enough in any case to induce the court to make a direct frontal attack, courts have in several cases executed successful flanking movements . . . thus straining the language out of its clear meaning.”<sup>120</sup> While courts claimed to

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<sup>115</sup> See Robyn L. Meadows, *Unconscionability as a Contract Policing Device for the Elder Client: How Useful Is It?*, 38 AKRON L. REV. 741, 741–42 (2005) (citing Carol B. Swanson, *Unconscionability Quandary: UCC Article 2 and the Unconscionability Doctrine*, 31 N.M.L. REV. 359, 361 (2001)).

<sup>116</sup> Meadows, *supra* note 115 (citing Evelyn L. Brown, *The Uncertainty of U.C.C. Section 2-302: Why Unconscionability Has Become a Relic*, 105 COM. L.J. 287, 289–90 n.3 (2000)).

<sup>117</sup> Meadows, *supra* note 115 (citing Harry G. Prince, *Unconscionability in California: A Need for Restraint and Consistency*, 46 HASTINGS L.J. 459, 468 n.4 (1999)).

<sup>118</sup> *Hume v. United States*, 132 U.S. 406, 411 (1889) (quoting *Earl of Chesterfield v. Janssen*, (1750) 28 Eng. Rep. 82 (Ch.) 100).

<sup>119</sup> Ehrenzweig, *supra* note 6, at 1090 (quoting Karl N. Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 YALE L.J. 704, 704 (1931) [hereinafter Llewellyn, *What Price*]).

<sup>120</sup> Patterson, *supra* note 4, at 222.

enforce adhesion contracts against less powerful parties, “the majority still allow[ed] recovery by the back door, so to speak.”<sup>121</sup> Further:

[C]ourts have made great efforts to protect the weaker contracting party and still keep “the elementary rules” of the law of contracts intact. As a result, our common law of standardized contracts is highly contradictory and confusing, and the potentialities inherent in the common law system for coping with contracts of adhesion have not been fully developed.<sup>122</sup>

Or with more flair:

The freedom of contract dogma is the real hero or villain in the drama . . . but it prefers to remain in the safety of the background if possible, leaving the actual fighting to consideration and to the host of other satellites—all of which is very often confusion to the audience which vaguely senses the unreality of the atmosphere.<sup>123</sup>

These practices continued through the adoption of the UCC.<sup>124</sup> In 1953, Professor Ehrenzweig acknowledged, “[a] court can ‘construe’ language into patently not meaning what the language is patently trying to say. It can find inconsistencies between clauses and throw out the troublesome one[,] . . . reject a clause as counter to the whole purpose” or employ “other techniques to reach a desired result.”<sup>125</sup>

As Karl Llewellyn and his colleagues of the Realist movement in jurisprudence often attested, most courts simply reached what they believed was the right result. Claiming to apply settled natural law doctrine, but without any consistent theory or articulation of standards,<sup>126</sup> resulted in chaos.<sup>127</sup> Perhaps the problem was, with the hordes of new lawyers<sup>128</sup> (and printers), many people could read

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<sup>121</sup> Kessler, *supra* note 18, at 635.

<sup>122</sup> *Id.* at 633.

<sup>123</sup> *Id.* at 639.

<sup>124</sup> See *infra* Part IV.

<sup>125</sup> Ehrenzweig, *supra* note 6, at 1090 (internal quotation marks and citation omitted).

<sup>126</sup> “Realists criticized the classical view that legal reasoning consisted solely of the syllogistic application of rules and precedents. They challenged the determinacy of legal rules and emphasized the range of choices presented to a judge in a given case.” ROBERT L. HAYMAN, JR., NANCY LEVIT & RICHARD DELGADO, *JURISPRUDENCE CLASSICAL AND CONTEMPORARY: FROM NATURAL LAW TO POSTMODERNISM* 156–57 (2d ed. 2002) (citing NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* 2–3 (1955)).

<sup>127</sup> Curtis Nyquist, *Single Case Research and the History of American Legal Thought*, 45 *NEW ENG. L. REV.* 589, 598 (2011) (“The essence of the [Realist’s] attack on the Classical system was that a formal rules system did not, and could not, work.”).

<sup>128</sup> B. Peter Pashigian, *The Number and Earnings of Lawyers: Some Recent Findings*, 3 *AM. B. FOUND. RES. J.* 51, 53 (1978) (noting there was a “30 percent increase in the number of lawyers (and judges) between 1920 and 1930”); THEODORE CAPLOW ET AL.,



court opinions and discuss how courts who claimed to apply established rules really did not; the whole mess was alarmingly inconsistent.<sup>129</sup> As decades passed, courts became less and less comfortable with applying such discretion to police contracts without a concrete doctrine on which to rely.

#### IV

##### LLEWELLYN AND MODERN ADHESION WITH FENCES

Even before the UCC, Karl Llewellyn, one of the most outspoken and influential drafters of the UCC, questioned the extent to which contracts of adhesion should be enforced.<sup>130</sup> While acknowledging that these standard, pre-printed, non-negotiable forms were a staple of business and that their use increased efficiency in many ways, Llewellyn was also acutely aware of the risks of giving unlimited license to one party to impose one-sided terms.<sup>131</sup> Llewellyn criticized the assumption that the non-drafting party had actually agreed to all of the terms in boilerplate clauses embedded within pre-printed agreements.<sup>132</sup> “What has been assented to,” Llewellyn noted:

are the few dickered terms, and the broad type of the transaction, and but one thing more. That one thing more is a blanket assent (not a specific assent) to any not unreasonable or indecent terms the seller may have on his form, which do not alter or eviscerate the reasonable meaning of the dickered terms.<sup>133</sup>

Llewellyn and others became supporters of the use of adhesive forms,<sup>134</sup> notwithstanding their full awareness about the legal skill levels and practice habits of small businesses.<sup>135</sup> In the famous words

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RECENT SOCIAL TRENDS IN THE UNITED STATES, 1960-1990 483 (1991) (reporting that the “production of new lawyers . . . quadrupled between 1960 and 1980.”).

<sup>129</sup> HAYMAN, LEVIT & DELGADO, *supra* note 126, at 156–57 (arguing that, boiled down to crude simplicity, the Realists challenged Formalists’ conception of the law’s certainty).

<sup>130</sup> See KARL N. LLEWELLYN, THE COMMON LAW TRADITION 362 (1960) [hereinafter Llewellyn, *Tradition*]; Llewellyn, *Book Review*, *supra* note 11, at 703; Llewellyn, *What Price*, *supra* note 119, at 731–32.

<sup>131</sup> *Id.*

<sup>132</sup> LLEWELLYN, *Tradition*, *supra* note 130, at 370.

<sup>133</sup> *Id.*

<sup>134</sup> Llewellyn, *What Price*, *supra* note 119, at 704–05.

<sup>135</sup> The UCC was based on a desire to change the law merchant to be compatible with the actual practice of small businesses that could not afford legal counsel for their transactions, but routinely used pre-printed forms with legal terms. See LLEWELLYN, *Tradition*, *supra* note 130, at 362.

of Bob Dylan, “times, they [were] a-changin’”<sup>136</sup> and with those times came some new problems that forced UCC drafters to make concessions to facilitate the growth of small businesses. Llewellyn nonetheless imagined a state of contract law that was comfortable with letting non-negotiated terms slide, so long as there were safety nets to prevent this allowance from swallowing the protections built into traditional contract law.<sup>137</sup> And in doing so he let the camel stick his head into the tent.<sup>138</sup>

#### A. UCC and Parties Who Do Not See

The 1952 UCC was the result of ten years of drafting as a joint project of the National Conference of Commissioners on Uniform State Laws and the American Law Institute. The drafters of the UCC were concerned about unwary consumers,<sup>139</sup> but they were also in tune with the realities of small businesses: the lack of regular access to lawyers and the problems of employees untrained in contract rules.<sup>140</sup> Even if lawyers had become much cheaper than they once were, the goals of the UCC could not be met if businesses could not pull some paperwork off a stack of forms affixed at one side with padded adhesive and stick one in every box. The cost of re-drafting would be prohibitive for anyone who could barely afford to have a lawyer draft the contract once. Not to mention, the cost of using employee time to negotiate details would have been both expensive and scary because of the fear of what some employee might agree to without close supervision.

The drafters of the UCC recognized that the forms provided by the businesses were very likely non-negotiable<sup>141</sup>—that was true even if

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<sup>136</sup> BOB DYLAN, *THE TIMES THEY ARE A-CHANGIN’* (Columbia Records 1964) (“Come senators, congressmen/Please heed the call/Don’t stand in the doorway/Don’t block up the hall/For he that gets hurt/Will be he who has stalled/There’s a battle outside/And it’s ragin’/It’ll soon shake your windows/And rattle your walls/For the times they are a-changin’”). We recognize that the lyrics in this song were likely written to encourage something more noble than consumer contract protection. But as lawyers who have chosen to be interested in contract law, we will use our imaginations and make up an era of *passionate* contract-law-related revolutions, if we have to.

<sup>137</sup> Llewellyn, *Tradition*, *supra* note 130, at 369–70.

<sup>138</sup> See HORACE E. SCUDDER, *THE CHILDREN’S BOOK* 18 (1907).

<sup>139</sup> See Llewellyn, *Tradition*, *supra* note 130, at 370 (discussing Llewellyn’s concerns that standard forms could become too dangerous for consumers if not reined in).

<sup>140</sup> See *id.*

<sup>141</sup> For a discussion on Llewellyn’s ideas about standard forms and the enforceability of terms Llewellyn understood to be standard or non-negotiable, yet conscionable, see generally Hillman, *supra* note 16.

such consumer was a contract lawyer, as we are both personally aware. Businesses presented customers with take-it-or-leave-it, boilerplate-filled, one-sided standard form contracts, making the ability to speak one's wishes to a neutral scrivener in the contracting process ancient history. In response to these concerns, UCC drafters attempted to curb the negative side effects of adhesion contracting by articulating a series of buffering protections.

### 1. UCC 2-207, *Battle of the Forms*

Preprinted form contracts did not just affect transactions between businesses and non-business consumers—it had some complicated effects on business-to-business transactions as well. The UCC drafters were aware that, in the craze to have a form that was twisted in one's own favor and sporting one's zany logo, businesses were exchanging forms that were unquestionably counter-offers under contract doctrine.<sup>142</sup> Thus, either a contract never did form, it formed in some other way without any terms at all, or it formed based on the terms of whichever party was lucky enough to have sent the last form in the volleys—thanks to the ancient and venerable contract doctrine now called the “last shot rule.”<sup>143</sup>

The UCC drafters decided to flout tradition and declare that, in some circumstances,<sup>144</sup> a contract based on contradicting forms *formed* anyway.<sup>145</sup> Despite their intent to bring some peace to the “Battle of the Forms,” the drafters declared that the scope of the terms would be decided under some process that has bewildered law scholars, not to mention students and practitioners, for half a century.<sup>146</sup> That process is found in the now-infamous UCC section 2-207.<sup>147</sup> Section 2-207 was drafted in recognition that not even

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<sup>142</sup> UCC § 2-207, cmt. 1 (2004).

<sup>143</sup> See *Diamond Fruit Growers, Inc. v. Krack Corp.*, 794 F.2d 1440, 1445 (9th Cir. 1986) (discussing how UCC § 2-207 did “away with the last shot rule”).

<sup>144</sup> Knowing *which* circumstances is confusing— just ask Judge Easterbrook who once thought two written forms were required. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1452 (7th Cir. 1996) (“Our case has only one form; UCC § 2-207 is irrelevant.”).

<sup>145</sup> See UCC § 2-207(1).

<sup>146</sup> Daniel Keating, *Exploring the Battle of the Forms in Action*, 98 MICH. L. REV. 2678, 2679 (2000) (“There is probably no other provision within the U.C.C. Article 2 that provides more confusion to law students and more challenge to the instructor than does section 2-207.”).

<sup>147</sup> For a discussion on the various interpretations and implications of UCC section 2-207 and the multiple approaches for using it, see generally, John E. Murray, Jr., *The Definitive “Battle of the Forms”*: *Chaos Revisited*, 20 J. L. & COM. 1 (2000). Unfortunately, § 2-207 will continue to confound even the most patient into the

business people read or otherwise register the legal implications of the terms provided by the other party.<sup>148</sup>

The UCC drafters embedded a safety net directly into sections 2-207(2) and (3) by requiring affirmative assent to terms the other party would not likely have noticed or agreed to and by inserting fair, balanced terms in their place.<sup>149</sup> Material terms that are asserted in the non-dickered part of a company's forms do not become added to the contract without some clear evidence of assent to such terms.<sup>150</sup> If the contract forms under section 2-207(1) notwithstanding the failure of both parties' terms aligning, then the different and additional terms are governed by subsection (2). If the parties are both merchants, the second sentence of subsection (2) kicks in.<sup>151</sup> This subsection provides that if the additional terms are material, they will be thrown out. The official comments describe "material" terms as those that will "result in surprise or hardship if incorporated without express awareness by the other party"<sup>152</sup> and non-material terms as those "which involve no element of unreasonable surprise" such as terms that only "slightly" alter obligations and do so in "reasonable" ways.<sup>153</sup> Thus, subsection (2) is one means of protecting parties from terms of which they are not aware. If the contract forms merely by conduct, under subsection (3) the terms of the contract are only those contained in both forms, along with any supplemental terms implied by the UCC—those considered fair, balanced, and reflective of ordinary business expectations.<sup>154</sup>

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foreseeable future as the helpful proposed revisions were thrown out with the bathwater when the revised UCC Article 2 was rejected, embarrassingly, in 2011. *Current Projects*, THE AMERICAN LAW INSTITUTE, [http://www.ali.org/index.cfm?fuseaction=projects.proj\\_ip&projectid=4](http://www.ali.org/index.cfm?fuseaction=projects.proj_ip&projectid=4) (last visited July 25, 2012) ("The 2003 amendments to UCC Articles 2 and 2A were withdrawn in 2011.").

<sup>148</sup> LARY LAWRENCE, LAWRENCE'S ANDERSON ON THE UNIFORM COMMERCIAL CODE 806 (3d ed. 2004).

<sup>149</sup> *Northrop Corp. v. Litronic Indus.*, 29 F.3d 1173, 1178 (7th Cir. 1994) ("The majority view is that the discrepant terms fall out and are replaced by a suitable UCC gap-filler."); Victor P. Goldberg, *The "Battle of the Forms": Fairness, Efficiency, and the Best-Shot Rule*, 76 OR. L. REV. 155, 160 (1997) ("A majority of jurisdictions have adopted the 'knockout' rule."); see also *Diamond Fruit*, 794 F.2d at 1445 (requiring a specific and unequivocal expression of assent on the part of the offeror when the offeree conditions its acceptance on assent to additional or different terms).

<sup>150</sup> UCC § 2-207(1).

<sup>151</sup> UCC § 2-207(2).

<sup>152</sup> UCC § 2-207, cmt. 4.

<sup>153</sup> UCC § 2-207, cmt. 5.

<sup>154</sup> UCC § 2-207(3).

## 2. UCC § 2-302, Unconscionability

The second safety net envisioned by Llewellyn and others was the doctrine of unconscionability. As mentioned in Part III.B, courts had been using the term “unconscionability” long before the UCC drafters made a provision governing the doctrine’s use.<sup>155</sup> As early as 1868 courts mentioned and assessed clauses in contracts according to principles of fairness and overreaching.<sup>156</sup>

“Unconscionability, as provided for in the Code, arose from the common law.”<sup>157</sup> Courts were initially unable to invalidate contracts simply because the terms seemed unfair.<sup>158</sup> As a result, these very annoyed courts began to get creative, looking for any reason to refuse to enforce the contract by finding problems with the construction or by merely citing “public policy” as a barrier to enforcement.<sup>159</sup> Charles Knapp has argued that the doctrine initially came about because merchants tried to “impose on their customers contracts that were grossly unbalanced and inequitable—either because the effects of those contracts were not initially apparent or because the merchants’ raw economic power enabled them to do so.”<sup>160</sup> But pre-UCC courts were relying on the doctrine before it had been labeled and defined and “[t]hese types of machinations created inconsistent and unpredictable results.”<sup>161</sup>

The doctrine received a considerable boost when it became codified in the UCC.<sup>162</sup> Unconscionability, after it was enshrined in the UCC, began to be called upon as the doctrine of choice to police market behavior that went too far in wielding commercial will against those without bargaining power.<sup>163</sup> The hope was that having an

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<sup>155</sup> UCC § 2-302.

<sup>156</sup> *Sussex R.R. Co. v. Morris & Essex R.R.*, 19 N.J. Eq. 13, 27 (N.J. Ch. 1868) (discussing but refusing to apply unconscionability in a commercial contract and finding that, while the clause in question “at first view, seemed very unequal and unconscionable,” the parties “agreed to these terms because they could not get better,” and this was not sufficient to prove unconscionability).

<sup>157</sup> Meadows, *supra* note 115, at 742.

<sup>158</sup> *See id.*

<sup>159</sup> *See id.*

<sup>160</sup> Charles L. Knapp, *Blowing the Whistle on Mandatory Arbitration: Unconscionability as a Signaling Device*, 46 SAN DIEGO L. REV. 609, 613 (2009).

<sup>161</sup> Meadows, *supra* note 115, at 742.

<sup>162</sup> *See* UCC § 2-302.

<sup>163</sup> Stephen E. Friedman, *Giving Unconscionability More Muscle: Attorney’s Fees as a Remedy for Contractual Overreaching*, 44 GA. L. REV. 317, 348 (2010) (explaining that unconscionability was a primary tool courts used to protect consumers from overreaching acts throughout the 1960s and 1970s).

articulated doctrine that could help police overreaching behaviors would lead to more predictable results. Now, judges uncomfortable with contracts they deemed unfair had an articulated doctrine to apply.<sup>164</sup>

The unconscionability doctrine became fixed early in the consumer protection movement in American jurisprudence that began in the 1960s and hit its apex in the 1970s.<sup>165</sup> Although that doctrine was in circulation before the UCC or courts reached the same result with other kinds of contortions,<sup>166</sup> the drafters of the UCC went further in setting forth an express statement of this protection. UCC section 2-302(1) provides that a court that finds a term to be unconscionable may invalidate the whole contract, throw out the unconscionable term, or limit the unconscionable term's application. Llewellyn once went on record stating that UCC section 2-302 was "perhaps the most valuable section in the entire Code."<sup>167</sup>

Llewellyn expressly stated that a contract drafter could not bind another party to terms that seem "unreasonable" or "indecent" unless these terms were actually "dickered" by both parties.<sup>168</sup> While a modern lawyer may argue that the clauses in online contracts are not unreasonable or indecent, there is little question that they would have been so characterized in Llewellyn's days.<sup>169</sup>

In 1969, John Spanogle noted Llewellyn's emphasis on the unconscionability doctrine and its intent to "inhibit the businessman or attorney from *automatically* asserting all conceivable rights in all transactions."<sup>170</sup> Llewellyn may possibly have intended for

<sup>164</sup> See Meadows, *supra* note 115, at 741.

<sup>165</sup> Melissa T. Lonegrass, *Finding Room for Fairness in Formalism—The Sliding Scale Approach to Unconscionability*, LOY. U. CHI. L.J. at 36 (forthcoming) (citing *Brown*, *supra* note 123, at 287) (discussing the progression of unconscionability over the decades, noting that some commentators in the 1970s began to "declare its demise"), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2053536](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2053536); Jane K. Winn & Mark Webber, *The Impact of EU Unfair Contract Terms Law on U.S. Business-To-Consumer Internet Merchants*, 62 BUS. LAW. 209, 211 (2006) (noting decrease in U.S. consumer protection legal activity since the 1960s and 1970s).

<sup>166</sup> Llewellyn, *What Price*, *supra* note 119, at 734. Courts were apparently addressing unconscionability at least as early as 1868. *Sussex R.R. v. Morris & Essex R.R.*, 19 N.J. Eq. 13 (N.J. Ch. 1868) (discussing unconscionability in the context of a railroad contract).

<sup>167</sup> 1 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 4.28 (3d ed. 2004) (quoting 1 N.Y. LAW REVISION COMM'N, HEARINGS ON THE UNIFORM COMMERCIAL CODE 121 (1954)).

<sup>168</sup> *Id.* § 4.26.

<sup>169</sup> See UCC § 2-207 (official comments).

<sup>170</sup> John A. Spanogle, Jr., *Analyzing Unconscionability Problems*, 117 U. PA. L. REV. 931, 941 (1969).

unconscionability to function in a much broader realm than it had by the time Spanogle wrote his article in 1969. But at the very least, UCC drafters did intend for unconscionability to protect parties in form contracts; the first draft of UCC section 2-302 was specifically limited to standard form contracts.<sup>171</sup>

It seems that, at least for a time, Llewellyn's hope had come to fruition—that the “most valuable section” would protect consumers as the pre-printed forms came to be more and more common. Professor Knapp argued that the:

doctrine of unconscionability seems actually to have done in the 1960s and 1970s precisely what its proponents might have hoped: it helped produce, at least for a while, a legal climate in which . . . [a] common voice sought to dispense a better brand of justice to consumers—not just to consumers of goods and services, but to consumers of the legal system itself.<sup>172</sup>

Unfortunately, this momentum for a “better brand of justice” was far too short-lived. After the newly-codified unconscionability doctrine was put to use in *Williams v. Walker-Thomas Furniture Co.*,<sup>173</sup> it was largely halted by scholars, the law and economics movement, and a fear of judicial activism.

#### *B. Restatement (Second) Good Faith, Unconscionability, and Reasonable Expectations*

In 1979 Restatement (Second) of Contracts section 205 implied in every contract “a duty of good faith and fair dealing in its performance and its enforcement.”<sup>174</sup> It also included a provision for voiding contracts based on a finding of unconscionability. The purpose of this section was to clearly articulate the fences that controlled contracting abuses, particularly those common with adhesion contracts. Comment (a) to section 208 recites the purpose and elements of unconscionability doctrine: “The determination that a contract or term is or is not unconscionable is made in the light of its setting, purpose and effect. . . . [T]he policy also overlaps with rules which render particular bargains or terms unenforceable on grounds

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<sup>171</sup> See *id.* at 942 (citation omitted). Spanogle also noted that all unconscionability cases up to 1969 involved standard form contracts. *Id.* at 942 n.47.

<sup>172</sup> Knapp, *supra* note 160, at 614.

<sup>173</sup> *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965).

<sup>174</sup> RESTATEMENT (SECOND) OF CONTRACTS § 205 (1979).

of public policy.”<sup>175</sup> The drafters of the Restatement closely followed the lead of the UCC in crafting and justifying these sections.

Another concept that provided a means to control abuse of standard form contracts appeared in section 211(3). It provides that “[w]here the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement.”<sup>176</sup> Section 211 was enacted in response to the decay of unconscionability doctrine, which left consumers with little protection against overreaching terms.<sup>177</sup> Some commentators have viewed the enactment of section 211 as a sort of last-ditch effort to try to save the dwindling consumer protection movement.<sup>178</sup>

Unfortunately, notwithstanding its potential as a restraint on adhesion contract abuses, the “reasonable expectations” protection contained in section 211(3) fared even worse in practice than the doctrine of unconscionability. Most of the cases that have cited this comment and its accompanying subsection involved insurance companies<sup>179</sup> and attest to its limited application in practice. The drafters clearly intended more. The illustrations following this comment show that section 211(3) was not intended to be limited to insurance contracts.<sup>180</sup>

But section 211(3) was not ignored everywhere. Tennessee has developed a doctrine known as the “circle of assent” that embodies the “reasonable expectations” principle of 211(3).<sup>181</sup> The “circle of assent” means that “the party who signs a printed form furnished by the other party will be bound by the provisions in the form over which the parties actually bargained and such other provisions that are not

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<sup>175</sup> *Id.* § 208, cmt. a.

<sup>176</sup> *Id.* § 211(3).

<sup>177</sup> *Id.*

<sup>178</sup> See Edith R. Warkentine, *Beyond Unconscionability: The Case for Using “Knowing Assent” as the Basis for Analyzing Unbargained-For Terms in Standard Form Contracts*, 31 SEATTLE U. L. REV. 469, 506 (2008) (citing Murray, *supra* note 147 (discussing Second Restatement § 211 in depth), and Wayne R. Barnes, *Toward A Fairer Model of Consumer Assent to Standard Form Contracts: In Defense of Restatement Subsection 211(3)*, 82 WASH. L. REV. 227, 265 (2007)).

<sup>179</sup> See, e.g., *State Farm Fire & Cas. Ins. Co. v. Grabowski*, 150 P.3d 275, 279 (Ariz. Ct. App. 2007); *Sutton v. Banner Life Ins. Co.*, 686 A.2d 1045, 1050 (D.C. 1996).

<sup>180</sup> RESTATEMENT (SECOND) OF CONTRACTS § 211(3) & illustrations 7, 8 (1981).

<sup>181</sup> Robert M. Lloyd, *The “Circle of Assent” Doctrine: An Important Innovation in Contract Law*, 7 TRANSACTIONS: TENN. J. BUS. L. 237, 239 (2006).



unreasonable in view of the circumstances.”<sup>182</sup> Although the expectations concept is not unique in Tennessee, it is rarely used by other courts in non-insurance contexts.<sup>183</sup>

## V

### DETERIORATION OF THE DISINCENTIVES FOR ABUSE

During the 1970s and 1980s, careful legal scholars continued to address the nuances and the balances required to make the leap from knowing assent to a world of form contracts.<sup>184</sup> The need for boundaries was still a fundamental assumption,<sup>185</sup> but strong economists were opening fire. The first doctrine to come under scrutiny was unconscionability. As a result, judges became hesitant to apply the doctrine for fear of being labeled “activists.” Economists had a similarly invasive effect on law schools and courts in general, the capstone of which is the U.S. Supreme Court case *Carnival Cruise v. Shute*<sup>186</sup> and its later use by courts as the symbol of efficiency over contract doctrine.<sup>187</sup>

#### *A. First Assaults on Unconscionability*

In 1967, Arthur Leff wrote his seminal article *The Emperor’s New Clause*, which directly challenged the *Walker-Thomas* decision and argued for the two-prong unconscionability requirement—procedural

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<sup>182</sup> *Parton v. Mark Pirtle Oldsmobile-Cadillac-Isuzu, Inc.*, 730 S.W.2d 634, 637-38 (Tenn. Ct. App. 1987).

<sup>183</sup> Lloyd, *supra* note 181, at 243.

<sup>184</sup> See generally Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173 (1983) (discussing these competing policies, courts’ trouble dealing with contracts in the 1980s, and the problems associated with accepting form contracts as valid); Eric Mills Holmes & Dagmar Thürmann, *A New and Old Theory for Adjudicating Standardized Contracts*, 17 GA. J. INT’L & COMP. L. 323 (1987); John E. Murray, Jr., *The Parol Evidence Process and Standardized Agreements Under the Restatement (Second) of Contracts*, 123 U. PA. L. REV. 1342 (1975); John P. Dawson, *Unconscionable Coercion: The German Version*, 89 HARV. L. REV. 1041 (1976) (same discussion but in the context of German law).

<sup>185</sup> Slawson, *supra* note 16, at 529.

<sup>186</sup> *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991).

<sup>187</sup> A shining example of this appears in *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1451 (1996), in which Judge Easterbrook cites *Carnival Cruise* for its efficient contract formation principles that allow drafters to avoid a much more “cumbersome way of doing things” which would “not only . . . lengthen queues and raise prices but also would scotch the sale of tickets by phone or electronic data service.” *Id.*

and substantive unconscionability.<sup>188</sup> While this article did not completely undermine unconscionability doctrine, it proved to be a significant blow as discretionary findings of unconscionability could no longer stand unchallenged.<sup>189</sup> In fact, as of June 2012, 408 law review articles and fifty judicial decisions have cited *The Emperor's New Clause*.<sup>190</sup>

Others joined in, arguing that market interaction could provide the incentives necessary to achieve efficient outcomes, without judicial policing.<sup>191</sup> They believed that, as consumers bargained, they either would agree on terms that were more favorable or would be compensated for agreeing to less favorable terms. Either of these options would lead to efficient outcomes without the need to alter contracts post hoc. Further, economists complained that businesses could not easily predict what terms would be found unconscionable.<sup>192</sup> Theoretically, that would leave businesses to guess as to their potential litigation costs and result in inefficiencies. Simply following the economists' line of thinking arguably made things easier for judges: using an economist approach allowed judges to simply enforce the contract without losing any sleep over its lack of fairness.<sup>193</sup>

### *B. Politics and the Fear of Activism*

Almost simultaneously in the 1960s, a fear of judicial activism began to grow. This fear was evidenced as early as 1968.<sup>194</sup> Richard Nixon's campaign platform included an anti-judicial-activist prong, which was allegedly a response to the perceived activism of the Warren court.<sup>195</sup> This fear of judicial activism was rooted in the alleged subjectivity of unconscionability—the idea that a judge will

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<sup>188</sup> Arthur A. Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 487, 505 n.71 (1967) (citing *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965)).

<sup>189</sup> Jeffrey W. Stempel, *Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism*, 19 OHIO ST. J. ON DISP. RESOL. 757, 818 (2004).

<sup>190</sup> Findings from WestLaw as of June 18, 2012.

<sup>191</sup> Stempel, *supra* note 189, at 822–23.

<sup>192</sup> Amy J. Schmitz, *Embracing Unconscionability's Safety Net Function*, 58 ALA. L. REV. 73, 75, 94 (2007).

<sup>193</sup> Stempel, *supra* note 189, at 823.

<sup>194</sup> *Id.* at 826.

<sup>195</sup> *Id.*

simply rule for whichever party he or she personally likes.<sup>196</sup> Some critics even suggest that judges decide cases based on what makes their “pulses race or their cheeks redden, so as to justify the destruction of a particular provision.”<sup>197</sup> These critics feared opportunity for this type of judicial activism, and their fear was rooted in the belief that unconscionability does not have objective requirements or guidelines.<sup>198</sup>

The shift away from protecting consumers happened at various levels. In the 1960s commentators touted the “great consumer protection” movement in legislation that arose because of the “failure of the legal system.”<sup>199</sup> Soon thereafter, much of the consumer legislation was repealed or relaxed in application, a change credited to Republican administrations.<sup>200</sup> “After a series of highly publicized courtroom and legislative successes in the 1960s and 1970s, the consumer movement suffered several setbacks in the 1980s [caused] by the Reagan and Bush administrations, whose chief ‘consumer protection’ goal was to release businesses from what they perceived as unnecessary, costly, and anti-competitive regulations.”<sup>201</sup> Professor Jane Winn and Brian Bix observed in 2006: “[I]n recent decades, the skepticism regarding the efficacy of government regulation has been growing at the same time that enthusiasm for market-driven institutional arrangements has increased. . . . Courts and regulators in the U.S. are generally deferential to private initiative and innovations in marketing.”<sup>202</sup> The judicial return to formalism and its exclusive focus on certainty and predictability has encouraged a “flurry of neoformalism in contracts scholarship.”<sup>203</sup> The focus in contract law,

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<sup>196</sup> Schmitz, *supra* note 192, at 96.

<sup>197</sup> *Id.* (quoting Leff, *supra* note 188, at 516).

<sup>198</sup> Schmitz, *supra* note 192, at 96.

<sup>199</sup> Robert H. Quinn, *Consumer Protection Comes of Age in Massachusetts*, 4 NEW ENG. L. REV. 71, 72 (1969). Foundational texts for the consumer movement include DAVID CAPLOVITZ, *THE POOR PAY MORE* (1967); JESSICA MITFORD, *THE AMERICAN WAY OF DEATH* (1963); RALPH NADER, *UNSAFE AT ANY SPEED* (1965).

<sup>200</sup> Stephen Meili, *Forum*, *Consumer Law Project at Wisconsin Law School*, 1992 WIS. L. REV. 1725, 1725 (1992).

<sup>201</sup> *Id.*

<sup>202</sup> Jane K. Winn & Brian H. Bix, *Diverging Perspectives on Electronic Contracting in the U.S. and EU*, 54 CLEV. ST. L. REV. 175, 183–84 (2006). They also note that “[o]utside the U.S., however, the notion that unmediated market forces should play a greater role in the relationship between merchants and consumers has not been embraced so eagerly.” *Id.* at 183.

<sup>203</sup> William J. Woodward, Jr., *Neoformalism in a Real World of Forms*, 2001 WIS. L. REV. 971, 1004 (2001).

as well as numerous other legal fields, has shifted since the early days of adhesion contracts. Consumer interests are now freely subsumed by renewed support for powerful, repeat players.

### C. *Economists Co-Opt Courts*

The Posner-Easterbrook invasion continued the push for economic theorizing in contract law.<sup>204</sup> At that time courts began overstating the one horn of the adhesion dilemma—the value of form contracts and merits of enforcing them to the letter—and increasingly lost sight of the other horn—maintaining the consistency of contract formation principles.<sup>205</sup> These courts relied on the analysis of early thinkers to justify adhesion contracts, notwithstanding their violence to core private law assumptions of free and knowing choice, but largely omitted consideration of the other half of the analysis.<sup>206</sup>

The law and economics movement stayed strong through the years, becoming the dominant intellectual and jurisprudential sub-discipline of law from the late 1970s.<sup>207</sup> The influence of the law and economics movement is further illustrated by the influence of one of its leading scholars, Judge Richard Posner. Posner has written hundreds of opinions involving contract law, the third most of any judge behind only Justice Benjamin N. Cardozo and Justice Roger J. Traynor.<sup>208</sup>

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<sup>204</sup> For detailed discussions of the specifics of the economic theories, see Eric A. Posner, Essay, *Economic Analysis of Contract Law After Three Decades: Success or Failure?*, 112 YALE L.J. 829 (2003); Richard Craswell, *In That Case, What is the Question? Economics and the Demands of Contract Theory*, 112 YALE L.J. 903 (2003); and Ian Ayers, Responses, *Valuing Modern Contract Scholarship*, 112 YALE L.J. 881 (2003).

<sup>205</sup> For a discussion on early thoughts about adhesion contracts and their acceptance, see Warkentine, *supra* note 178, at 489.

<sup>206</sup> See, e.g., *Sullivan v. Savin Bus. Machs. Corp.*, 560 F. Supp. 938, 940 (N.D. Ind. 1983) (explaining that “[t]here are often valid reasons militating in favor of so-called ‘adhesion contracts,’ not the least of which is the desire for a uniform facilitation of the conduct of trade”); *Huff v. Bekins Moving & Storage Co.*, 702 P.2d 1341, 1343 (Ariz. Ct. App. 1985) (calling adhesion contracts “necessary” and noting that “just because a contract is described as a contract of adhesion does not mean that it is unenforceable”); *Rory v. Cont’l Ins. Co.*, 703 N.W.2d 23, 41 (Mich. 2005) (choosing to recognize adhesion contracts as enforceable just like any other contract “because [that view] is most consonant with traditional contract principles [that the] state has historically honored”).

<sup>207</sup> Stempel, *supra* note 189, at 824.

<sup>208</sup> Lawrence A. Cunningham, *Cardozo and Posner: A Study in Contracts*, 36 WM. & MARY L. REV. 1379, 1383 (1995). The measure was “based on a tabulation of the number of opinions by all judges reproduced as main cases in current contracts casebooks. The survey includes majority as well as dissenting and concurring opinions, but it excludes cases that are only cited or summarized rather than being reprinted substantially in full.” *Id.*

Since unconscionability doctrine and the economists' free market principles seemed unable to coexist, the movement pushed unconscionability further from the minds of judges.<sup>209</sup>

#### *D. The Collapse of Unconscionability*

Caught between the stampeding law and economics movement and the growing trend of anti-activist cynicism, unconscionability was thrown from the saddle. In the early 1980s there were only thirty-three cases involving UCC section 2-203, and of those, only one clearly cited unconscionability.<sup>210</sup> From January 2004 to January 2005, only thirty-three unconscionability claims were allowed to proceed past the summary judgment stage.<sup>211</sup> Only seven of those cases ended with the court invalidating the contract.<sup>212</sup>

This dearth of successful unconscionability cases has continued. In addition, when courts *have* resorted to unconscionability in the last decade, it has been in conjunction with the imposition of arbitration clauses.<sup>213</sup> Today, the U.S. Supreme Court has all but entirely squelched unconscionability as a defense to defeat mandatory arbitration. Unconscionability has been bucked, trampled, kicked, and bitten into relative obscurity.

While a diluted form of unconscionability is still viable in some states, its existence is no longer very helpful in the context of online contracts. The kinds of cases in which even a weak unconscionability finding is likely are those involving extremely sympathetic parties who are unusually disadvantaged by class, age, education, language skills, intellectual capacity, inner city location, cultural unfamiliarity, and inexperience.<sup>214</sup> In other words, the sort of person who is shopping online and engaging in social networking on his or her

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<sup>209</sup> Stempel, *supra* note 189, at 824–25.

<sup>210</sup> Schmitz, *supra* note 192, at 94. Professor Eric Posner also commented on this shift, explaining that unconscionability analysis in published opinions was rare by 1995. Eric A. Posner, *Contract Law in the Welfare State: A Defense of the Unconscionability Doctrine, Usury Laws, and Related Limitations on the Freedom to Contract*, 24 J. LEGAL STUD. 283, 306–07 (1995).

<sup>211</sup> Schmitz, *supra* note 192, at 93–94.

<sup>212</sup> *Id.*

<sup>213</sup> See *Rent-A-Center, W., Inc. v. Jackson*, 130 S. Ct. 2772, 2778 (2010) (requiring claims that a contract with an arbitration clause failed to form because of unconscionability be heard by an arbitrator); and *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011) (finding enforceable an arbitration clause in a mobile phone subscriber contract even though it would deprive consumers the option of class action).

<sup>214</sup> Preston, *supra* note 26, at 257.

smart phone is not likely to qualify. Online consumers are generally savvy enough to use, and privileged enough to have access to, a computer.

Moreover, “the substantive elements for unconscionability are too numerous and complex to be workable in large numbers of contract cases.”<sup>215</sup> Apprehensive of delving into an exercise in discretion that may be labeled “activist,” courts will engage in unconscionability analysis only in the most obvious, traditional cases,<sup>216</sup> and those will not include the typical online shopper.

The treatment of online contracts challenged as unconscionable is well-illustrated by a recent Fifth Circuit case that upheld, with very little discussion, a ruling that online terms were not unconscionable, even though they “were on a subpage of [the drafter’s] website and in the equivalent of four-point font.”<sup>217</sup> The court was satisfied that they were “sufficiently legible and accessible.”<sup>218</sup> The court did, however, note the concern with allowing these contracting practices outright and explained, “contracts formed in whole or in part over the internet present relatively new considerations for the courts, and will continue to challenge the courts as the internet plays an increasingly important role in commerce.”<sup>219</sup> The court alleged that “[w]hile new commerce on the internet has exposed courts to many new situations, it has not fundamentally changed the principles of contract.”<sup>220</sup> Ironically, the court then suggested that the “principles of contract” that continue to apply online do not include unconscionability.

Unfortunately, the Fifth Circuit’s approach to online contracts is not unique. Courts across the country seem to be following this trend of accepting online, non-negotiable contracts that U.S. Supreme Court Justice Sotomayor would have considered unenforceable just ten years ago when she wrote the majority opinion for the Second Circuit in *Specht v. Netscape Communications Corp.*<sup>221</sup> Other recent

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<sup>215</sup> Slawson, *supra* note 16, at 564.

<sup>216</sup> Perhaps the most oft-cited unconscionability scenario is represented by *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965), in which the sympathetic parties, who were faced with highly overreaching boilerplate terms, were uneducated and vulnerable to abuse.

<sup>217</sup> *One Beacon Ins. Co. v. Crowley Marine Servs., Inc.*, 648 F.3d 258, 264, 270 (5th Cir. 2011).

<sup>218</sup> *Id.* at 264.

<sup>219</sup> *Id.* at 268.

<sup>220</sup> *Id.* (quoting *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 403 (2d Cir. 2004)).

<sup>221</sup> *Specht v. Netscape Commc’ns Corp.*, 306 F.3d 17, 35 (2d Cir. 2002) (holding that a browsewrap contract buried in a webpage with little notice to the customer was unenforceable).

examples of courts rejecting unconscionability claims in online contracts include *Pentacostal Temple Church v. Streaming Faith, LLC*,<sup>222</sup> in which a court threw out an unconscionability argument, holding that a customer who has notice of contract terms does not have a basis for claiming procedural unconscionability. In *Evans v. Linden Research, Inc.*,<sup>223</sup> the court found that a forum selection clause was not unconscionable in an online contract because the consumer had to click “I agree” before proceeding, and therefore had notice of the terms.<sup>224</sup> Thus, the inferred notice from a thoughtless click alone had become enough to swallow unconscionability analysis. The court seems to have forgotten that unconscionability doctrine is not about whether there was evidence of acceptance. After all, in *Walker-Thomas*, Ms. Williams had signed a lengthy agreement.

### *E. Attenuated Assent and the Shutes*

As adhesion contracts became deeply entrenched in market practice and law, other contract principles not ordinarily thought of as policing doctrines retained some part of the foundational contract principles of choice and autonomy. Most importantly, the concept of knowing assent assured that, at the minimum, weaker contracting parties had notice that terms existed and required some action in circumstances laden with cautionary signals.<sup>225</sup>

However, in the last two decades, courts have accepted “implications” rather than “manifestations” of knowing assent.<sup>226</sup> The Supreme Court’s opinion in *Carnival Cruise v. Shute*<sup>227</sup> was a significant marker of the erosion of the knowing assent requirement. Of *Carnival Cruise*, Judge Easterbrook bragged: “These days even left-wing judges enforce forum-selection clauses in tiny type on the back of steamship tickets.”<sup>228</sup>

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<sup>222</sup> *Pentacostal Temple Church v. Streaming Faith, LLC*, No. 08-554, 2008 WL 4279842, at \*5 (W.D. Pa. Sept. 16, 2008).

<sup>223</sup> *Evans v. Linden Research, Inc.*, 763 F. Supp. 2d 735 (E.D. Pa. Feb. 3, 2011).

<sup>224</sup> *Id.* at 740–41.

<sup>225</sup> For a discussion of the effect of “knowing assent” as a basis for analyzing the enforceability of contracts, see Warkentine, *supra* note 178.

<sup>226</sup> See *supra* notes 39–40 (listing a number of cases stating that clickwrap agreements are generally enforceable and that, because people should be aware by now that there are contracts associated with webpages, their use of the pages implies acceptance).

<sup>227</sup> *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991).

<sup>228</sup> Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1119, 1121–22 n.11 (1998). Easterbrook’s footnote for this statement cites *Carnival Cruise*, thus illustrating that Easterbrook saw the Rehnquist Court as left leaning; but more interestingly, the footnote adds: “see also *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th

In *Carnival Cruise*, the Court enforced a forum-selection clause in the fine print of a cruise line ticket that the consumers did not receive until weeks after entering the contract by booking the cruise.<sup>229</sup> Of course, the Shutes family took the affirmative action of boarding the boat after the terms were available, but the contract to which the terms applied had already been formed.<sup>230</sup> Although the Court suggested that the Shutes could have rescinded the contract after having access to the terms,<sup>231</sup> the face of the ticket belied the scope of that remedy.<sup>232</sup> According to the ticket terms, the Court then gave credence to a forum selection clause,<sup>233</sup> and the Shutes were forced to litigate a personal injury claim in Florida, rather than their home state of Washington.<sup>234</sup>

In the wake of *Carnival Cruise*, corporations have the power to select a forum for litigation, but, more relevant to our purposes, courts readily embrace mere implications of assent. Courts may now assume that a person means to assent based on the circumstances and common nature of the transaction,<sup>235</sup> rather than requiring showing of an intention to agree based on the person's actual affirmative action or manifestation.<sup>236</sup> While inferences from affirmative manifestations cannot perfectly speak to the intent of the party, it is at least a more accurate portrayal of a person's intentions than the existence of a disclaimer on a piece of paper in the person's possession.

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Cir. 1997)," suggesting he sees the Seventh Circuit and himself as left leaning. *Id.* at 1122 n.11. Surely that is heresy.

<sup>229</sup> *Carnival*, 499 U.S. at 595.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> *Id.* The majority does not discuss paragraph 16(a) of the ticket, which provides that "[t]he Carrier shall not be liable to make any refund to passengers in respect of . . . tickets wholly or partly not used by a passenger." *Id.* at 597 (Stevens, J., dissenting) (alterations and omissions in original). The Shutes likely did not receive the copy of the ticket until the right to cancel without a substantial penalty had passed. A nod is as good as a wink to a blind horse, and the opportunity for refund seems just as illusory.

<sup>233</sup> "Forum-selection clauses have historically not been favored by American courts. Many courts, federal and state, have declined to enforce such clauses on the ground that they were 'contrary to public policy,' or that their effect was to 'oust the jurisdiction' of the court." *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972) (citation omitted); see also Charles L. Knapp, *Contract Law Walks the Plank: Carnival Cruise Lines, Inc. v. Shute*, 12 NEV. L.J. 553, 555 (2012).

<sup>234</sup> *Carnival*, 499 U.S. at 588.

<sup>235</sup> See Preston & McCann, *supra* note 19, at 28–29. In the online context, courts that assume the legitimacy of browsewrap agreements do so primarily on the basis that assent is implied by the person continuing to use the website that contains a contract binding all users. See *id.*

<sup>236</sup> See Knapp, *supra* note 233, at 562.



The *Carnival Cruise* decision is “a prime exemplar of the so-called ‘rolling’ contract” where “contract law is seemingly moving inexorably toward a state in which neither the presence nor the absence of actual consent has any real significance.”<sup>237</sup> The Court declared that terms unknown at the time of contracting would be enforced as long as there was an opportunity to obtain a refund once the terms were known and the terms demonstrated “fundamental fairness.”<sup>238</sup> But the Court’s scrutiny into fundamental fairness merely discussed the fact that Carnival Cruise Lines did not *mean* to “discourage” claims and it had a reasonable excuse for picking Florida as the forum: saving money.<sup>239</sup> But if all corporate decisions could be legitimized with money-saving justifications, there would be arguably more serious costs to bear than the loss of protections in consumer transactions.

In any event, these cases seem to be setting an ever-growing trend of accepting adhesion contracts across industries without batting an eye at the overreaching terms or overreaching nature of the transaction.<sup>240</sup> As long as courts continue to accept increasingly ambiguous actions as evidence of assent or fail to allow unconscionability to do its job, unwary consumers will continue to get stuck by adhesion contracts without an anti-adhesive for use in combat.

As the convenience of boilerplate terms and standard forms have won the day,<sup>241</sup> the traditional policies of contract formation have been compromised. Consumers are helpless to combat the necessary evils of standard form contracting contemplated by the UCC drafters.<sup>242</sup> If current courts are accepting these terms and these types of contracts on the basis that UCC drafters initially found them to be acceptable, then these courts are only looking at half the picture—the

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<sup>237</sup> *Id.*

<sup>238</sup> *Carnival*, 499 U.S. at 595.

<sup>239</sup> *Id.*

<sup>240</sup> See *supra* notes 39–40; see also Kaustuv M. Das, *Forum-Selection Clauses in Consumer Clickwrap and Browsewrap Agreements and the “Reasonably Communicated” Test*, 77 WASH. L. REV. 481 (2002) (discussing adhesion contracts and their ever-increasing acceptability in courts, particularly since many contracts have moved online).

<sup>241</sup> See Hillman, *supra* note 16, at 743 (“Despite lots of notoriety and spilled ink over the general issue of standard-form contracts, contract law has responded effectively to the problem by following Karl Llewellyn’s conception to enforce bargained-for terms and conscionable boilerplate provisions, while barring egregious terms.”).

<sup>242</sup> See *supra* Part IV.

half that does not include the back-up engine that justified allowing the contracts in the first place.

## VI

### LLEWELLYN, FREEDOM OF CONTRACT, AND FEUDALISM, THEN AND NOW

We agree that it is too late to turn back the tide of the twentieth century to accepting contracts of adhesion notwithstanding the pillars of freedom of contract.<sup>243</sup> “It is not even profitable to spend ‘the energy of counsel, the money of clients and the time and analysis of judges’ in discussing the problems presented by contracts of adhesion . . . to proclaim that recovery is ‘contrary to the well settled principles of contract law.’”<sup>244</sup> The economic benefits (or the political and economic power of stronger market players) overpower the purity of contract doctrine and the principles that gave weaker parties freedom to contract. Nonetheless, at some point economic benefits must not trump every principle of contract law, and the exercise of ultra-authority by the powerful, repeat players in the market must be bounded just as the power of government must be bounded.

What is well overdue is a return to the values expressed by Karl Llewellyn that surrounded and balanced the acceptance of adhesion form contracts. Llewellyn encouraged judges to consider fairness and morality in law. He and other Realists only ask that the judge make explicit the grounds for the decision and substantiate the decision with logic.<sup>245</sup> Random displays of discretion can be contained in doctrinal conceptions such as unconscionability. “‘Reason’ in law . . . implies the use of Reason in *choosing premises* which have a reason, and the use of Reason in judging the reasonableness of any outcome or goal.”<sup>246</sup>

Llewellyn advocated judicial decisions reaching “right” and just conclusions, but not in response to the particular sympathies in a particular case,<sup>247</sup> or transitory conditions.<sup>248</sup> Rather results should

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<sup>243</sup> Kessler, *supra* note 18, at 629.

<sup>244</sup> *Id.* at 638 (quoting William O. Douglas, *Vicarious Liability and Administration of Risk I*, 38 YALE L.J. 584, 594 (1929)).

<sup>245</sup> See, e.g., RICHARD A. WASSERSTROM, *THE JUDICIAL DECISION* 27 (1961).

<sup>246</sup> Karl N. Llewellyn, *On the Good, the True, the Beautiful, in Law*, 9 U. CHI. L. REV. 224, 235-36 (1942) (emphasis in original).

<sup>247</sup> What Llewellyn calls “fireside equities.” See, e.g., KARL N. LLEWELLYN, *THE CASE LAW SYSTEM IN AMERICA* 79 (Michael Ansaldi trans., Paul Gewirtz ed. 1989).

<sup>248</sup> LLEWELLYN, *TRADITION*, *supra* note 130, at 121.

change as a result of “situation sense,”<sup>249</sup> loosely meaning an understanding of policies on a larger scale rather than mechanical application of legal rules. Reading Llewellyn makes clear that he would not have approved of mechanical application of economic principles either. Llewellyn respected social science and judicial understanding of real, lived human behavior,<sup>250</sup> a consideration sometimes missed in economic science.

Llewellyn accepted the value of predictability and precedent, but he balanced that with an understanding that law must change to meet new circumstances. He urged courts to acknowledge that law must evolve and develop rather than hide development under a rubric of applying existing precedents.<sup>251</sup> His jurisprudence would recognize that, especially in the online context, as discussed in Part I, the values of economic efficiency, predictability, and certainty need to be reassessed and rebalanced with the need for policing abuses.

In an article touting the value of neoclassicists, Professor Murray describes a Llewellynian approach to contract law’s fall to the law and economic regime.<sup>252</sup> Although it uses far too many labels for our taste, we agree with his conclusion:

Neoclassicists do not deny the imperfections of the current system and judicial vision. Nor do they deny the potential contributions of the relationists, empiricists and economists. The insuperable obstacles are their insistence that they have discovered unitary truth, their corresponding rejection of on-going neoclassical theory that prevails in the real world, and their failure to provide even hints of functional substitutes in an ambience of practical judicial reasoning. . . . Llewellyn’s aspiration of a more decent, conscionable, good faith contracts society is necessarily a work in progress. . . . [I]t is not enough to reject a mandate such as unconscionability, good faith or other Llewellynesque standards or “leeways” as fatally vague. . . . Whatever deficiencies lie in the vagaries of Llewellyn’s efforts, there can be no reasonable doubt about his underlying purpose.<sup>253</sup>

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<sup>249</sup> Karl Llewellyn, *On the Current Recapture of the Grand Tradition*, 9 U. CHI. L. SCH. RECORD, 1960, at 3 (reprinted in HAYMAN, LEVIT & DELGADO, *supra* note 126, at 215).

<sup>250</sup> WILLIAM L. TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* 22 (1973).

<sup>251</sup> Karl N. Llewellyn, *Some Realism about Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931).

<sup>252</sup> John E. Murray, Jr., *Contract Theories and the Rise of Neoformalism*, 71 FORDHAM L. REV. 869 (2002).

<sup>253</sup> *Id.* at 913–14.

A return to feudalism, at least in the adhesive contract and cyberspace arena, is a realistic metaphor.<sup>254</sup> The feudal system blossomed because the functional limitations on the king mandated the delegation to sub-units of military and political responsibility to combat invasion and crime.<sup>255</sup> As the lords swore fealty and made specific oaths, the king granted powerful and expansive benefits to his lords.<sup>256</sup>

Contracts of adhesion mirror the feudal system, especially online. The court system and the power of government to enforce judgments is the king, and drafters of adhesion contracts are the lords. Courts grant benefits upon drafters to facilitate large-scale consumer contracting. However, courts originally pronounced limitations, much like feudal oaths. Further, like the idea of fealty, unconscionability was meant to limit the free rein of drafters as they began exercising this new power. Additionally, the dynamics of the relationship between consumer and commercial actor, especially in conjunction with online contracting, is not dissimilar to a feudal manor.<sup>257</sup>

With online adhesive contracts, this return to feudalism metaphor suggests that corporate lords do not automatically protect consumer serfs and may actually be driven to exploit them.<sup>258</sup> The feudal system's growth led to the expansion of discretion and power for the manorial lords as the king became further removed from his subjects.<sup>259</sup> Similarly, as the use and enforcement of adhesive contracts expands, the corporate lords' drafters have seen and will continue to see an expansion of discretion and power unless courts begin limiting them. Simply, the acceptance of online adhesive contracts with little intervention or scrutiny by the courts permits the drafters to engage in serf exploitation.

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<sup>254</sup> See Yen, *supra* note 15.

<sup>255</sup> *Id.* at 1232–34 (citing MARC BLOCH, *FEUDAL SOCIETY* 3–39 (L.A. Manyon trans., 1961)); North & Thomas, *supra* note 46, at 782 (explaining the economic system of the manorial system and the issues the system combated such as war, labor needs, and protection for the labor force).

<sup>256</sup> Yen, *supra* note 15, at 1233; Lazarus, *supra* note 46, at 1746 n.58 (discussing the typical services of vassals or manorial lords owed to their liege lords).

<sup>257</sup> See *supra* Part II. The feudal system is premised on aggregated, similar, and powerful lords who are able to exploit their serfs.

<sup>258</sup> See Yen, *supra* note 15, at 1256.

<sup>259</sup> *Id.* at 1234 (“[T]he subdivision and transfer of fiefs to inferior vassals led to the fragmentation of government. The association of land with right and authority to govern meant that lords gave away some of their power whenever they granted land to their vassals. Over time, this practice took significant power from the king . . . and vested it in local lords who often administered justice over their subjects with relative impunity.”).

While mantras such as “return to feudalism” seem overdramatic, the questions about power distribution are real and must be the subject of serious reflection, especially as we embrace the Internet. The Electronic Freedom Foundation and a plethora of courtiers have engaged in ideological warfare to protect the notion that the Internet is the liberation of the common geek over political tyrannies.<sup>260</sup> But their focus on government as the enemy may be misplaced. “Netizens,” or individuals who actively use the Internet, are rightfully entitled to contract for reasonable protection of their code, creativity, and efforts in building a thriving digital marketplace. Unfortunately, the temptation is to spread beyond such protection to impose hidden contractual provisions that range from imbalanced to draconian, and to cover issues far afield from licensing rights. The regular imposition of such terms through methods that hide the risks, and the terms themselves, should raise serious alarm. Essentially, adhesive contracts are threatening to swallow traditional contract principles.

### CONCLUSION

As means of contracting continue to advance and the economic pressures mount, the law in this area will also evolve with or without our awareness. With the advent of clickwrap and browsewrap formation and the ability to conceal the breadth and depth of terms that would be visible to a party handed a form in the real world, commentators are struggling to find a cohesive and workable stratagem for imposing some limits on their excesses. The doctrines of unconscionability and knowing assent have been unsuccessful at the task.

In 1953 Albert A. Ehrenzweig observed that:

At the end of the last century the courts made the law do its share in protecting and encouraging our fast-growing industry and commerce. . . . And when the hazards of mechanized trade and commerce began to harm thousands of innocent bystanders by monopolistic pressures, the temper of the time considered this [] an inevitable sacrifice to freedom and progress, and the law followed suit by subjecting the adherent who signed on the dotted line to a “contract” law of meeting minds.<sup>261</sup>

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<sup>260</sup> For a discussion of the Electronic Freedom Foundation, John Barlow’s (Grateful Dead) Declaration of the Independence of Cyberspace, and the attitudes of Internet Frontiersmen generally, see Preston, *Internet and Pornography*, *supra* note 14.

<sup>261</sup> Ehrenzweig, *supra* note 6, at 1089.

Although Ehrenzweig was referring to the end of the nineteenth century, his comments apply just as well to the twentieth century in which such trends are magnified. Ehrenzweig hoped that enforcement of adhesion contracts would not pass the line of reason. He declared: “No longer will the law purport to protect a freedom to impose restraints on oneself which, ‘in the hands of the weak and necessitous, defeats the very end of liberty.’”<sup>262</sup> While time has shown that his attempt to draw a line in 1953 was fruitless, surely the advent of browsewraps has now pushed us again to such a demand.

Adhesive online contracts, in particular, have become effective instruments in the hands of powerful industrial and commercial overlords. This spectacle is all the more fascinating considering that it was contract ideology that successfully tore down the last vestiges of a feudal order a hundred years ago.<sup>263</sup> An 1895 treatise on medieval English law sums up the problem of contract and feudalism nicely: “[T]he law of contract threatened to swallow up all public law. . . . If there is to be any law at all, contract must be taught to know its place.”<sup>264</sup>

While we were sleeping, the noble objects of contract law were being lost. Freedom of contract envisioned the choice of serfs to define their own commitments, rather than be subject to the largely unfettered pronouncements of the powerful lord to which serfs were subject by status. In the digital age, our legal system allows powerful parties to stipulate terms on every aspect of a person’s online activity without even the requirement of clear notice. Have we lost the ideals of a jurisprudence appalled by *Lochner v. New York*<sup>265</sup> and the enforcement of contracts that enslaved bakers to work weeks in excess of sixty hours because they had no other options for employment?

The pendulum has swung wide in favor of online contracts and crafty lawyers who have inserted surprisingly harsh and unexpected terms because the length and complexity of online contracts ensure they will not be read even if they can be found. Courts must again learn to see the circumstances by which these contracts are imposed,

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<sup>262</sup> *Id.* (quoting Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 484 (1909)).

<sup>263</sup> Kessler, *supra* note 18, at 640–41. The case Kessler alludes to is *Priestly v. Fowler*, (1837) 150 Eng. Rep. 1030 (Ex.). Kessler’s work incorporates Roscoe Pound’s prediction of the imperialism of powerful commercial interests. See Roscoe Pound, *The New Feudalism*, 16 A.B.A. J. 553, 554 (1930).

<sup>264</sup> FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 230 (1895).

<sup>265</sup> *Lochner v. New York*, 198 U.S. 45 (1905).

consider the extent to which they threaten fundamental principles of contract law, and exert the restraints necessary to maintain some balance of power.

